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Nos. 772 and 809

In the Supreme Court of the United States

OCTOBER TERM, 1938

H. P. HOOD & SONS, INC. AND NOBLE'S MILK COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA AND HENRY A. WALLACE, SECRETARY OF AGRICULTURE

WHITING MILK COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND HENRY A. WALLACE, SECRETARY OF AGRICULTURE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINION BELOW

The opinion of the District Court for the District of Massachusetts, dated February 23, 1939, grant-

ing a permanent injunction, is not yet reported (R. Vol. I, 107-114).[1]

JURISDICTION

The decree of the District Court was entered March 9, 1939 (R. Vol. I, 102-106). An appeal to the United States Circuit Court of Appeals for the First Circuit was allowed on March 9, 1939. The jurisdiction of this Court is derived from Section 240a of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE INVOLVED

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246), 7 U. S. C., Supp. IV, §§ 601 *et seq.* An annotated compilation of the Act is attached to this brief as Appendix C.

The regulation involved is Order No. 4 as amended which regulates the handling of milk in the greater Boston, Massachusetts, marketing area, and which was issued by the Secretary of Agriculture under the provisions of the Agricultural Marketing Agreement Act. A copy of Order No. 4 as amended is attached to this brief as Appendix D.

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[1] Unless otherwise specified, all record references are to the record in *H. P. Hood & Sons, Inc., et al.* v. *United States et al.*, No. 772.

QUESTIONS PRESENTED

1. Whether the Agricultural Marketing Agreement Act of 1937 unconstitutionally delegates legislative power to the Secretary of Agriculture.

2. Whether the Agricultural Marketing Agreement Act of 1937 and Order No. 4 as amended promulgated thereunder, are proper exercises of the power of Congress to regulate interstate commerce.

3. Whether the provisions of the Agricultural Marketing Agreement Act and of said Order No. 4 as amended deprive the petitioners of property without due process of law, in violation of the Fifth Amendment.

4. Whether the amendments to Order No. 4 were validly promulgated by the Secretary of Agriculture in compliance with the provisions of the Agricultural Marketing Agreement Act of 1937.

5. Whether the Market Administrator, in computing the blended price, improperly included the milk of persons who were not producers within the meaning of Article I, Section 1, of Order No. 4 as amended.

STATEMENT

I. Proceedings in the Courts Below

A. In H. P. Hood & Sons, Inc., et al. *v.* United States et al., No. 772

On October 1, 1937, respondents filed a bill of complaint in the District Court for the District

of Massachusetts to enjoin petitioners from violating Order No. 4 as amended, regulating the handling of milk in the greater Boston, Massachusetts, marketing area (hereinafter referred to as "the order" or as "the order as amended"). The bill alleged that petitioners were engaged in handling milk in the current of interstate commerce or milk that directly burdened and affected such commerce; that Order No. 4 and the amendments thereto were validly issued by the Secretary of Agriculture and were in force; that petitioners were subject to the terms of the order; and that petitioners had failed and refused to obey the order. The bill prayed for a preliminary and a permanent injunction (R. Vol. I, 2–13).

On November 30, 1937, the District Court issued a temporary injunction requiring petitioners to obey the order (R. Vol. I, 65). On December 8, 1937, the Senior Circuit Judge for the First Circuit granted a supersedeas continuing the temporary injunction in effect on condition that petitioners deposit in the registry of the court the amounts billed to them by the Market Administrator for equalization charges and marketing services under the terms of the order (R. Vol. I, 66–67). Upon appeal from the temporary injunction, the Circuit Court of Appeals for the First Circuit continued in effect the injunction as superseded pending a final determination of the case on the merits (*H. P. Hood & Sons, Inc., et al.* v. *United States*, 97 F. (2d) 677). Under the terms of the temporary in-

junction as superseded, petitioners have deposited $1,564,471.17 in the registry of the court (R. Vol. I, 131–132).

Petitioners filed answers on November 3, 1937, alleging the unconstitutionality of the Agricultural Marketing Agreement Act, the invalidity of Order No. 4 and the amendments thereto, and that no sums were legally owing under the terms of the order (R. Vol. I, 23–48). On December 30, 1937, E. Frank Branon, a producer selling milk to petitioner H. P. Hood & Sons, Inc., was allowed to intervene as a party defendant (R. Vol. I, 68).

This case, together with twenty-seven companion cases, was referred to a special Master to hear evidence and find the facts (R. Vol. I, 67–68).[1] On January 27, 1939, after more than sixty days of trial, the special Master filed his report (R. Vol. I, 77). The Master's report, which together with certain of the exhibits attached thereto comprises Volume II and Volume III of the record, includes detailed findings with respect to the promulgation and amendment of Order No. 4; the history of, and economic conditions in, the Boston market; the administration of Order No. 4 as amended; and the business and practices of the defendants in the several cases tried before the Master.

On February 23, 1939, the District Court rendered an opinion confirming the Master's report and sustaining the constitutionality of the Act and

[1] The Honorable William A. Loughlin of Gardiner, Massachusetts, sat as the special master.

the validity of the order (R. Vol. I, 116–131). On February 27, 1939, the District Court rendered a supplemental opinion which held that the statements of fact contained in the opinion were intended as findings of fact, and the statements of legal conclusions were intended as rulings of law in accordance with Rule 52 of the Federal Rules of Civil Procedure, and that "all of the material facts in the case are contained in the Master's report" (R. Vol. I, 130–131). On March 9, 1939, a decree was entered which confirmed the Master's report, permanently enjoined petitioners from violating the order, and provided for the distribution of the moneys impounded in the registry of the court to those persons entitled to such moneys under the terms of the order (R. Vol. I, 102–106). On the same day petitioners filed their notice of appeal to the Circuit Court of Appeals for the First Circuit (R. Vol. I, 132). Thereupon the District Court entered a stay of its decree pending the determination of the case on appeal (R. Vol. I, 133–134). The case was docketed in the Circuit Court of Appeals on March 21, 1939. On March 24, 1939, before hearing or judgment in the Circuit Court of Appeals, petitioners filed in this Court a petition for a writ of certiorari. That petition was granted on March 27, 1939.

B. IN WHITING MILK COMPANY *v.* UNITED STATES ET AL., NO. 809

This suit is a companion suit to the case of *H. P. Hood & Sons, Inc., et al.*, v. *United States, et al.*,

No. 772. The bill of complaint, which was filed on the same date, contains allegations similar to those in the *Hood* case (R. Vol. I, 1–3).[3] The prayers for relief were the same and the proceedings in the court below followed a similar course. Prior to the hearing on the permanent injunction Chester D. Noyes, a producer delivering milk to the petitioner Whiting Milk Company, was allowed to intervene as a party defendant (R. Vol. I, 36). During the pendency of this litigation petitioner Whiting Milk Company deposited $563,130.02 in the registry of the court under the terms of the temporary injunction as superseded by the order of Senior Circuit Judge for the First Circuit and as affirmed by the Circuit Court of Appeals for the First Circuit (R. Vol. I, 99). The opinion of the District Court rendered February 23, 1939, was applicable to this case as well as the other cases then before it, and similar decrees were entered in all of the cases (R. Vol. I, 63–67, 76–91). Petitioner filed notice of appeal on March 10, 1939 (R. Vol. I, 91), and the case was docketed in the Circuit Court of Appeals on March 23, 1939. On March 25, 1939, prior to hearing or judgment in that court, petitioner filed in this Court a petition for a writ of certiorari. The petition was granted on March 27, 1939.

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[3] The record references in this subsection B refer to the record in the case of *Whiting Milk Company* v. *United States et al.*, No. 809.

II. The Provisions of the Agricultural Marketing Agreement Act of 1937

The Court is respectfully referred to the detailed description of the provisions of the Agricultural Marketing Agreement Act of 1937, which is contained on pages 10 to 17 of the brief for the United States in *United States of America* v. *Rock Royal Co-operative, Inc., et al.*, No. 771.

III. Proceedings in Connection With the Promulgation of Order No. 4 and the Amendments Thereto

A. The promulgation of order no. 4

Order No. 4 was originally issued on February 7, 1936, pursuant to the provisions of the Agricultural Adjustment Act of 1933 (Act of May 12, 1933, 48 Stat. 31, as amended August 24, 1935, 49 Stat. 750). The proceedings in connection with the promulgation of Order No. 4 may briefly be described as follows:

1. *Notice of Hearing.*—On November 30, 1935, the Secretary of Agriculture, pursuant to Section 8c (3) of the statute, gave notice of a public hearing on a proposed marketing agreement and order regulating the handling of milk in the greater Boston marketing area (R. Vol. II, 4–5).

2. *The Hearing.*—In accordance with the notice, public hearings were held pursuant to Section 8c (3) of the statute on December 10 and 11, 1935, at St. Johnsbury, Vermont, and on December 12, 1935,

at Boston, Massachusetts. At these hearings interested parties were offered an opportunity to be heard on the proposed marketing agreement and order. A certified copy of the testimony and exhibits received at these hearings was introduced in evidence before the Master, and attached to his report as Appendix A, and made a part thereof. This appendix has been certified to this Court as an original exhibit (R. Vol. II, 6; Vol. I, 134).

3. *Tentative Approval of the Proposed Marketing Agreement.*—On January 18, 1935, the Secretary tentatively approved a marketing agreement. Thereafter handlers of 50 percent of the volume of milk in the proposed area failed to sign the tentatively approved agreement (R. Vol. II, 6).

4. *Proclamation as to the base period.*—On January 25, 1936, the Secretary of Agriculture, acting pursuant to the provisions of Section 8e of the statute, issued a proclamation in regard to the base period which was to be used in establishing the minimum prices fixed by the order. In that proclamation he declared that the purchasing power of milk in the greater Boston marketing area could not be satisfactorily determined from available statistics in the Department of Agriculture for the period August 1909 to July 1914, but that the purchasing power of such milk could be satisfactorily determined from available statistics in the Department of Agriculture for the period August 1919 to July 1929; and that the latter period should

be used for the purpose of executing a marketing agreement and issuing an order for that area (R. Vol. II, 6–7).

5. *Determination as to the necessity for issuing an order.*—On February 5, 1936, the Secretary, acting under provisions of Section 8c (9) of the statute, determined that the refusal or failure of handlers of 50 percent of the volume of milk covered by the proposed marketing agreement to sign the agreement tended to prevent the effectuation of the declared policy of the Act; that the issuance of the proposed order was the only practical means pursuant to such a policy of advancing the interests of producers in the area; and that the issuance of the proposed order was approved by 75 percent of the producers who, during a representative period, had engaged in the production of milk for sale in the area (R. Vol. II, 7–9). This determination was approved by the President of the United States on February 6, 1936, in accordance with the provisions of Section 8c (9) of the statute (R. Vol. II, 9).

6. *The issuance of Order No. 4.*—On February 7, 1936, the Secretary, acting pursuant to the provisions of 8c (4) of the Act, issued Order No. 4, regulating the handling of milk in the greater Boston marketing area. The order contained detailed findings with respect to conditions in the greater Boston marketing area, and the provisions of the

order, including a finding that all of the terms and conditions of the order would tend to effectuate the declared policy of the Act. The order became effective at 12:01 A. M. on February 9, 1936 (R. Vol. II, 9–36).

7. *The suspension of Order No. 4.*—Order No. 4 remained in effect until August 1, 1936. At that time the Secretary suspended the order (R. Vol. II, 36–37).[4]

B. THE AMENDMENT OF ORDER NO. 4

The order amending Order No. 4 was issued pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937 which reenacted and amended the Agricultural Adjustment Act (June 3, 1937, c. 296, 50 Stat. 246). The proceedings in connection with the issuance of the amendment may be briefly described as follows:

1. *Notice of hearings on a proposed new marketing agreement and order.*—On June 19, 1937, the Secretary of Agriculture gave notice of hearings to be held on a proposed marketing agreement and order regulating the handling of milk in the greater Boston marketing area (R. Vol. II,

[4] On July 23, 1936, the District Court for the District of Massachusetts, on the authority of *United States* v. *Butler*, 297 U. S. 1, held that the provisions of the Agricultural Adjustment Act under which the order had been issued were unconstitutional. *United States* v. *Buttrick*, 15 F. Supp. 655.

37–39). On June 24, 1937, the Secretary gave notice of the cancellation of those hearings (R. Vol. II, 39–40).[5]

2. *Notice of hearing on a proposed amendment.*—On June 24, 1937, the Secretary issued a notice of a hearing with respect to a proposal to amend Order No. 4 and to amend the marketing agreement which had been tentatively approved on January 18, 1936 (R. Vol. II, 41–43).

3. *Termination of the suspension of Order No. 4.*—On June 25, 1937, the Secretary issued an order terminating the suspension of Order No. 4. That order provided that the termination was to be effective as to certain provisions of Order No. 4 on July 1, 1937, and was to be effective as to the remaining provisions on August 1, 1937 (R. Vol. II, 40–41).[6]

4. *The hearings on the proposed amendment.*—In accordance with the notice, hearings were held pursuant to Section 8c (3) of the Act in St. Johnsbury, Vermont, on June 30, 1937; in Boston, Massachusetts, on July 1, 1937; and in Augusta, Maine,

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[5] On June 16, 1937, the Circuit Court of Appeals for the First Circuit reversed the decision of the District Court referred to in footnote 3, *supra*. *United States* v. *Bullock*, 91 F. (2d) 66.

[6] The provisions which were reinstated as of July 1, 1937, may be described as the formal and administrative provisions of the order. The provisions which were reinstated as of August 1, 1937, may be described as the price-fixing and payment provisions of the order.

on July 2, 1937. At these hearings interested parties were given an opportunity to be heard and to introduce evidence. A certified copy of the testimony and exhibits received at these hearings was introduced in evidence before the Master and attached to his report as Appendix B and made a part thereof. This Appendix has been certified to this Court as an original exhibit (R. Vol. II, 43; Vol. I, 134).

5. *Tentative approval of the proposed amendment.*—Thereafter the Secretary tentatively approved the amendment to the Marketing Agreement, and handlers of 50 percent of the volume of milk in the area failed to sign the agreement as amended (R. Vol. II, 44).

6. *Determination as to the necessity for issuing the amendment.*—On July 27, 1937, the Secretary, acting pursuant to the provisions of Section 8c (9) of the Act, determined that the failure of handlers of 50 percent of the volume of milk in the area to sign the proposed marketing agreement tended to prevent the effectuation of the declared policy of the Act; that the issuance of the amendment to the order was the only practical means of advancing the interests of producers in the area pursuant to such policy; and that the amendment was favored by 70 percent of the producers who, during a representative period, had engaged in the production of milk for sale in the area (R. Vol. II, 44–45). That determination was approved on July 27,

1937, by the President of the United States.[7] (R. Vol. II, 45.)

7. *Issuance of the amendment.*—On July 28, 1937, the Secretary, after making detailed findings, including a finding that the issuance of the amendment to the order and all the terms and conditions of the order as amended would tend to effectuate the declared policy of the Act, issued the amendment to Order No. 4 (R. Vol. II, 46-59). The amendment provided that it should become effective at 12:01 A. M. on August 1, 1937.

IV. The History of the Boston Market and a Description of the Economic Conditions Existing Therein

Order No. 4 as amended applies to the greater Boston, Massachusetts, marketing area (hereinafter referred to as the "Boston market" or as the "marketing area"), which includes Boston and certain other nearby towns and cities.[8] The legal problems

[7] For the purpose of determining whether the issuance of the amendment was favored by the producers, the Secretary, acting pursuant to the provisions of Section 8c (19) of the Act, conducted a referendum in the milkshed. The relevant facts with respect to this referendum are discussed on pages 112–119, *infra*.

[8] The Boston market includes the territory within the boundary lines of the cities and towns of Arlington, Belmont, Beverly, Boston, Braintree, Brookline, Cambridge, Chelsea, Dedham Everett, Lexington, Lynn, Malden, Marblehead, Medford, Melrose, Milton, Nahant, Needham, Newton, Peabody, Quincy, Reading, Re[illegible]e, Salem, Saugus, Somerville, Stoneham, Swampscott, Wakefield, Waltham,

which arise under the Agricultural Marketing Agreement Act of 1937 and Order No. 4 as amended should be considered in the light of the economic problem in the Boston market with which the Act and the order deal. The Master's report contains detailed findings with respect to this problem. (R. Vol. II, 76–136). The more pertinent findings of the Master on this aspect of the case may be summarized as follows:

A. THE ECONOMIC IMPORTANCE OF THE DAIRY INDUSTRY

In 1929 the national total cash income from all farm production was $10,284,479,000 of which 18 percent was derived from dairy products. By 1932 the total farm income had dwindled to $4,368,296,000 of which 22.6 percent was income from dairy products. In 1935 the total farm income had risen to $7,203,416,000, but only 17.9 percent was income from dairy products (R. Vol. II, 93). In the same year, however, in Massachusetts, 37.7 percent of the state's total cash income from farm production was from dairy products; in Maine, 24.2 percent; in New Hampshire, 44.1 percent; and in Vermont, 66.8 percent (R. Vol. II, 93). It is also significant to note the percentage of farms in these four states which reported for the year 1929 that more than 40 percent of their income was derived from dairying. The percentages follow:

Watertown, Wellesley, Weymouth, Winchester, Winthrop, and Woburn, Massachusetts.

Maine, 16.9; New Hampshire, 29.1; Vermont, 57,9; and Massachusetts, 30.4 (R. Vol. II, 95).*

There are approximately 40,000 dairy farmers in the New England states and approximately 18,000 of them are engaged in producing milk for the Boston market. In the greater part of New England, dairying is the principal agricultural occupation (R. Vol. II, 90).

B. THE HISTORY OF DAIRYING IN NEW ENGLAND

Since 1890 there has been a marked increase in the production of milk in New England for sale as fluid milk in Boston and other marketing areas. By 1890 the diversified type of agriculture formerly practiced, consisting of the cultivation of small grains and the raising of livestock, had been largely replaced by dairy farming. Dairy farming, between 1890 and 1920, consisted of the production of milk for cream or for butter purposes. In the beginning butter was made on the farm; later whole milk was delivered to a local creamery

* In 1936 the Massachusetts Milk Control Board in a report to the General Court of Massachusetts (House No. 328—January 1937) stated:

> The dairying industry of Massachusetts is the third largest industry in the State. During the past two years there has been an increase in the number of dairy cows on farms in the Commonwealth, and in 1935 the value of dairy farm property in the Commonwealth was estimated in excess of two hundred million dollars.
>
> The business of supplying consumers with milk and its products in the Commonwealth requires the services of more than fifty-two thousand people.

where it was separated and the butterfat marketed as cream or butter; about 1910 the farmers began separating their cream on the farm and delivering it to the local creameries. Beginning in 1920 there was a shift to the production of milk for the fluid milk market. Among the factors contributing to this shift were the higher prices received for fluid milk, the construction of roads through rural areas, and the growth of cooperative creameries engaged in receiving whole milk for shipment to the Boston market (R. Vol. II, 110–112).

The change from the production of milk for use as cream or butter to the production of milk for fluid purposes resulted in increased costs of production for the farmer. The production and distribution of milk for fluid purposes are subject to special sanitary regulations imposed by the New England States and by the local subdivisions thereof. So far as these regulations apply to the prod ction of milk they relate to the cleanliness and ventilation of stables and milk houses; the use of proper equipment for cooling milk; the health and cleanliness of cows; and a number of other circumstances (R. Vol. II, 89). Compliance with these regulations requires expenditures for equipment and increases operating costs. As a result it costs from 35 to 50 cents per hundredweight more to produce milk for fluid purposes than it does to produce milk for manufacturing purposes or for cream (R. Vol. II, 111–112).

C. THE BOSTON MILKSHED AND INTERSTATE COMMERCE IN MILK IN THE BOSTON MARKET

In the New England area the Boston market is generally considered as the primary milk market. All other markets in that area are termed secondary markets (R. Vol. II, 87). The present Boston milkshed [10] covers that part of Maine south of Bangor, a large part of New Hampshire, practically the entire State of Vermont, a small area along the eastern boundary of New York, and a relatively small portion of the Commonwealth of Massachusetts (R. Vol. II, 78–79). The growth of the Boston milkshed from 1900 to its peak in 1926 is shown by four maps in the Master's report (R. Vol. II, 77). The present milkshed is shown by a map showing the location of country receiving stations shipping to Boston (R. Vol. II, 79).

Commerce in milk in the Boston market is predominately interstate in character. The following table shows the average percentage of the total supply of milk in the Boston market, supplied by each of the listed states during the period 1930 to 1936 (R. Vol. II, 78):

Vermont	58 percent
New York	7 percent
Maine	12 percent
Massachusetts	11 percent
New Hampshire	12 percent

[10] The area in which are located farms that produce the fluid milk supply for a metropolitan area is ordinarily described as a milkshed (R. Vol. II, 76).

Milk is a highly perishable product and because of its bulk cannot profitably be shipped a long distance. If it is to be sold for consumption as fluid milk, it must be moved rapidly from the point of production to the ultimate consumer so as to reach the consumer in a condition which complies with the health regulations in the market. Consequently, the size of the milkshed is, to some extent, limited by these factors. However, milk which is to be used for manufacturing purposes can be gathered from an area much wider than the area which furnishes the fluid milk supply. One reason for this is the fact that such milk can be converted into a concentrated product near the source of supply, thereby reducing the shipping costs in relation to the cost of transporting the raw milk. Furthermore, the concentrated products are less perishable and may be shipped greater distances (R. Vol. II, 78–80).

D. DISTRIBUTING AGENCIES AND THEIR METHODS OF OPERATION

The distributing agencies subject to Order No. 4 as amended are defined by the order as "handlers" and will be so designated in this brief. The handlers operating in the Boston market include both cooperative organizations of producers and proprietary dealers. There are two principal types of cooperative organizations in the market. One is the bargaining cooperative whose primary function is

to bargain on behalf of its members with the handlers as to the sale price of milk which the members deliver directly to the handlers (R. Vol. II, 112). This type of cooperative is not classified as a handler by the order.

The other type of cooperative organization owns and operates facilities for the handling and processing of milk which it receives directly from its members (R. Vol. II, 112–113). Such cooperatives are handlers as defined in the order (Order, Art. I, par. 6; R. Vol. II, 60). In this latter class there are cooperatives which do only a wholesale business and also cooperatives which distribute directly to consumers through organizations which they own or control (R. Vol. II, 112).[11]

The proprietary handlers operating in the Boston market, such as petitioners, are either individuals or corporations (R. Vol. II, 116). The Hood Company[12] and the Whiting Company are the largest proprietary handlers operating in the mar-

[11] The largest cooperative in the market, New England Dairies, Inc., not only handles the milk of its members but also sells the milk of a number of independent cooperative associations. At the present time, twelve cooperative organizations are members of New England Dairies, Inc. On January 1, 1936, New England Dairies, Inc., controlled approximately 75 percent of the total milk coming into the greater Boston marketing area. Between that date and January 1, 1938, the percentage decreased to 30 to 40 percent (R. Vol. II, 114).

[12] Unless otherwise specified the Hood and Noble Companies will be collectively referred to as the Hood Company; Noble's Milk Company is a subsidiary of H. P. Hood & Sons, Inc. (R. Vol. II, 215).

ket (R. Vol. II, 118). Their relative position in the market is indicated by the fact that, in the delivery period August 1–15, 1937, these two handlers controlled approximately 50 percent of the Class I or fluid milk sales in the Boston market and controlled 33 percent of all sales in the market (R. Vol. II, 118).

Among the proprietary organizations engaged in the retail distribution of milk in the market, some receive all or most of their milk directly from producers; others buy all or the greater portion of their milk from other handlers. Some of the smaller handlers produce all of their supply on their own farms (R. Vol. II, 118). The order and this litigation affect chiefly those handlers who fall within the first category. Such handlers operate in substantially the same manner as petitioners whose operations are described in the Master's report (R. Vol. II, 212–216). However, these handlers operate on a smaller scale and relatively few of them engage in manufacturing operations of any kind.[13]

Most of the larger proprietary handlers and all of the operating cooperative organizations operate country receiving stations (R. Vol. II, 118). These stations are located at points throughout the milkshed where the handlers collect or receive milk from producers. A map showing the location of the various country stations operated by handlers

[13] For a description of the organization and business of several of the smaller handlers, see Record, Vol. II, 237–266.

supplying the Boston market appears in the Master's report (R. Vol. II, 79).

At receiving stations which handle only milk which is to be used for fluid purposes, the milk is weighed, tested, cooled, and put in containers for shipment to the market (R. Vol. II, 118). Some of the receiving stations also have equipment for manufacturing operations.[14]

E. ECONOMIC CONDITIONS, MARKETING DEVICES, AND COMPETITIVE PRACTICES IN THE BOSTON MARKET

1. *Methods of pricing milk.*—The uses of milk may be divided into two general categories: (1) consumption in fluid form as an item of diet, and (2) manufacture into cream, ice cream, butter, condensed milk, candy, and similar products. The value of milk depends primarily upon the use to which it is put. Prior to 1918, milk was usually sold in the Boston market on what is known as the "flat price plan" (R. Vol. II, 123–124). Under this system the handler paid the producer a fixed price—usually announced in advance—for all milk delivered, regardless of the use which was actually made of the milk (R. Vol. II, 123).

Since 1918 the greater part of the milk handled in the Boston market has been paid for primarily on the basis of the use which the handler has made

[14] A station which is so equipped necessarily represents a larger capital investment than a station which handles only fluid milk (R. Vol. II, 118). There are also certain additional operative costs incidental to such a station which are not incurred in handling fluid milk. (R. Vol. II, 118–119).

of the milk (R. Vol. II, 96, 120–121, 124–128). For the purposes of this method of payment, milk has been classified as "Class I" and "Class II" (R. Vol. II, 96). The definitions of these two classes have varied from time to time, but, normally, all milk used for fluid purposes was treated as Class I and paid for on that basis while milk used for other purposes was classified as Class II and paid for on the basis of a lower price [18] (R. Vol. II, 9 122).

Order No. 4 as amended defines Class I milk as "all milk sold or distributed as milk, chocolate milk, or flavored milk, and all milk not specifically accounted for as Class II milk" (Art. III, Sec. 1, par. 1), and Class II milk as "milk specifically accounted for (a) as being sold, distributed, or disposed of other than as milk, chocolate milk, or flavored milk, and (b) as actual plant shrinkage within reasonable limits" (Art. III, Sec. 1, par. 2). The definitions contained in the order substantially represent the customary classification adopted in the market (R. Vol. II, 96, 122, 124–128).

Class II milk has always brought a substantially lower price in the Boston market. Since Class II milk is used for manufacturing purposes, it must compete in the market with milk which does not meet the strict requirements applicable to milk

[18] There have been times when the classifications used for the purpose of fixing prices have been merely bargaining devices which had no relation to the actual use to which the milk was put. This was particularly true of the classifications IIa and IIb (R. Vol. II, 96, 126–129).

produced for consumption as fluid milk, and with products of milk produced in other parts of the United States (R. Vol. II, 97). Furthermore, the fact that the area supplying Class I milk is restricted (R. Vol. II, 78, and see p. 19, *supra*) makes it possible for producers to obtain a higher price for milk which is to be used for Class I purposes. But there are no physical or intrinsic characteristics which distinguish Class I milk from Class II milk (R. Vol. II, 97). Thus the classification and, accordingly, the difference in the price a producer receives for milk of the two classes rests not upon differences in cost of production or in quality but solely upon the use made of the milk after it leaves the hands of the producer.

2. *Methods of distributing the proceeds of prices.*—When a farmer delivers his milk to a handler in the form of whole milk he does not deliver Class I or Class II milk as such. Because the milk of a particular producer is commingled with the milk of many other producers, the handler does not know to what use the milk of the particular producer is ultimately put. Some kind of an equalization or pooling device is therefore an essential part of any use price plan (R. Vol. II, 122).

One such equalization device is the so-called dealer pool. In a dealer pool the dealer pays to the producers who sell milk to him a price per hundredweight which is sometimes called the "blended" or "composite" price. This price is

computed in the following manner. The total number of units sold by such dealer for Class I purposes is multiplied by the Class I price. The total number of units sold or utilized for Class II purposes is multiplied by the Class II price. The two results are added together and the sum is divided by the total number of units of milk. The resulting quotient is the blended or composite price paid by that dealer to his producers. Other dealers pay their producers prices similarly computed on the bases of their utilization. The blended price paid by each dealer may differ from that paid by other dealers. It varies with the percentage of milk utilized by the individual dealer in each of the classes (R. Vol. II, 122–123).

A market-wide pool is an equalization device under which the individual producer is paid for the milk which he sells in accordance with the use made of all the milk sold in the market rather than the use made of the individual producer's milk or the use made of all the milk of the particular dealer to whom the producer delivered. Thus, the blended price or composite price is computed, in the case of a market-wide equalization pool, by multiplying the amount of all the milk in the market disposed of for Class I purposes by the Class I price and the amount of all the milk disposed of in the market for Class II purposes by the Class II price and by dividing the sum of the two resulting figures by the total amount of milk disposed of in the market (R. Vol. II, 123).

Order No. 4 as amended provides for equalization on the basis of a market-wide pool. In effect, the order treats the milk of all producers engaged in production of fluid milk for the Boston market as if commingled in a common supply reservoir from which the various handlers purchase at the minimum class prices fixed in the order. A more detailed description of the operation of the order appears on pages 34–41, *infra*.

3. *Necessity for an adequate supply of fluid milk.*—According to the 1930 census, the population of the cities and towns constituting the greater Boston marketing area was 2,001,770 (R. Vol. II, 88–89). In 1937, a daily average of 616,200 quarts of fluid milk and 63,360 quarts of cream were brought by rail and truck into the marketing area (R. Vol. II, 88). These figures indicate a daily average consumption of approximately six-tenths of a pint of fluid milk per person.

Fluid milk is a necessary article of diet for children and is an extremely valuable article of diet for adults. Milk provides vitamins which cannot be obtained as easily from other foods (R. Vol. II, 88). It is of paramount importance that an adequate and wholesome supply of fluid milk be available at all times. As it has been explained on page 17, *supra*, the applicable health regulations entail additional expense. The necessity for an adequate fluid milk supply produced in conformity with the health regulations makes it imperative

that farmers receive a price which will enable them to comply with the applicable regulations.

4. *The difficulty of adjusting the supply of fluid milk to the demand.*—From month to month the demand for fluid milk does not vary to any great extent. There are, however, daily variations (R. Vol. II, 94). It is always necessary to have available in excess of the normal daily demand a surplus which is sufficient at all times in the year to meet the peak daily demand (R. Vol. II, 94). For example, in order to have an adequate supply for November, the period of the year when the supply available for the Boston market is smallest, it is necessary that there be sufficient production to meet the normal demand for fluid milk plus a surplus equal to 20 or 25 percent of the total supply (R. Vol. II, 94, 96). This 20 or 25 percent surplus is sometimes referred to as the "necessary surplus" (R. Vol. II, 94). As is implied by the term, this surplus must be available to meet any extraordinary requirements. If not sold as fluid milk it must be converted into manufactured products because milk is a perishable commodity that cannot be stored.

The difficulties in the Boston market arise from natural factors peculiar to milk production. The production of milk varies greatly at different seasons of the year (R. Vol. II, 92). Cows normally freshen in the spring and are fed grass which increases the flow of milk. As pastures begin to

dry up, the production of milk falls off. Normally, production reaches the lowest point in November, begins to increase in February, and reaches the peak in June (R. Vol. II, 92). The number of cows necessary to produce the fluid milk requirements, plus the necessary surplus in November, will produce a much greater amount at other seasons of the year (R. Vol. II, 96). Considering the amount of milk produced by the number of dairy cows being milked for the Boston market in November as 100, the amount of milk produced by the same number of cows for the month of June would normally be approximately 175; for the month of July 165; for the month of August 150; for the month of September 140; and for October 130 (R. Vol. II, 92).

In view of these conditions, it is apparent that if milk is to be available to supply the fluid milk requirements of the Boston market in the period of least production, facilities must be provided for handling the inevitable excess at other seasons of the year. This excess is usually converted into manufactured products and consequently commands a substantially lower price (R. Vol. II, 96, 97). The problem arises as a result of the necessity, in the period of flush production, of diverting for low priced manufacturing uses, some part of all of the milk produced by some farmers whose production is necessary to meet the fluid milk requirements of the market in the short season.

5. *Competitive Practices.*—Due to the fact that the price of Class I or fluid milk has always been higher than the price of Class II milk which is used for manufacturing purposes, the tendency has been for farmers to attempt to dispose of a greater part of their milk as Class I (R. Vol. II, 98). Since the farmers' access to the fluid milk market is through the handler and the ratio between the amount of milk sold as Class I and the amount sold as Class II varies between handlers, the tendency has been for farmers to attempt to market their milk through handlers who maintain a low percentage of Class II or surplus milk (R. Vol. II, 98). This tendency has caused price competition among producer groups which has resulted in lower prices to all farmers (R. Vol. II, 98–99). Price cutting among producer groups has also led to a general cutting of prices by handlers (R. Vol. II, 98). The Master's report contains specific findings with respect to the disorderly marketing conditions which from time to time have ensued as a result of these competitive practices.[16] Furthermore, at times the

[16] See particularly the findings of the Master with respect to the price declines in 1926 and 1930 (R. Vol. II, 98). See also his findings with respect to the situation in 1933 when it was necessary for the largest cooperative association to make an adjustment in its announced price at the end of each month in order to meet the competition of milk which was coming into the market at cut prices (R. Vol. II, 99). The Master also found that on three different occasions between 1916 and 1936 disputes have arisen between groups of producers and handlers in the market with respect to the

decreases in the price to farmers have not been accompanied by corresponding decreases to consumers (R. Vol. II, 99–100).

The record shows that the Boston market is extremely sensitive to such competitive tactics and that a relatively small amount of milk can easily disturb the equilibrium of the market. It is possible that as little as two thousand quarts of milk may affect the price (R. Vol. II, 135). There has been a time when a carload of milk would drop the wholesale price in the market as much as one cent per quart. In the absence of regulation this would be true today (R. Vol. II, 135). Moreover, any regulation which is to be effective must be applicable to all milk. If the order should be applied to only part of the milk in the market, it would be possible for some handlers to obtain a competitive advantage by purchasing milk which was not regulated (R. Vol. II, 135). The inevitable result would be disruption of the market.[17]

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marketing of milk which have resulted in the withdrawal of milk from certain distributors. One of these so-called "milk strikes" occurred in 1936–1937 and as a result some of the handlers in the market found it necessary to obtain supplies of fluid milk from areas in Vermont and New York which normally shipped to the New York market (R. Vol. II, 100–101).

[17] In the period between 1933 and 1936 certain flat-price buyers in the market, who did not comply with the federal licenses and orders, bought close to their fluid milk requirements, paid slightly more than the blended price payable under the license and orders, and still obtained their milk at a cost which was lower than the cost of Class I milk pre-

6. *Efforts to solve the problems created by the burden of the surplus milk and the competitive practices which that burden stimulated.*—Between 1915 and 1933 a number of investigations were made of conditions in the Boston market with a view to examining marketing conditions and the price fluctuations which had occurred from time to time and for the purpose of formulating plans to deal with such conditions. In 1916 and 1917 the Boston Chamber of Commerce made such a study and on December 31, 1917, published a report entitled "The Milk Question in New England" (R. Vol. II, 132). In 1921 and 1922 a committee, consisting largely of producers, made an investigation of marketing practices in the Boston market with a view to devising a marketing plan. A similar study was made in 1924 with particular reference to the developments which had taken place in the Boston market between 1921 and 1923 (R. Vol. II, 132). Again in 1927 the Commissioners of Agriculture of the states of Maine, New Hampshire, Vermont, and Massachusetts caused a study to be made with respect to the prices of milk, various suggested marketing plans, and certain proposals which had been made for the handling of surplus milk (R. Vol. II, 132-133).

In 1930, the Commissioners of Agriculture in the states of Maine, New Hampshire, Vermont,

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scribed in the license and orders (R. Vol. II, 136). It is obvious that these handlers obtained a substantial competitive advantage by these tactics.

and Massachusetts selected a committee for the purpose of holding hearings and making recommendations from which they hoped to bring about a more orderly and stabilized condition in the Boston market (R. Vol. II, 130). This committee submitted a report recommending that a central marketing agency be formed to handle and market the milk of northern New England so as to bring about a uniform basis of price in the market and promote sales for all producing groups. It was intended that the central agency should operate a market-wide pool so that all producers would have a fair share of the fluid milk market. This plan was never consummated (R. Vol. II, 130).

In 1932 producer organizations requested the Governors of the New England states to appoint a board to work out a uniform basis for the sale of milk in the Boston market (R. Vol. II, 130). This board was known as the Governor's Dairy Advisory Board and, working in conjunction with producer organizations, proposed a plan for establishing uniform prices and a market-wide equalization pool. The proposal did not receive the necessary assent of a sufficient number of producers and was not put into effect (R. Vol. II, 130–131).

Subsequently, another plan was evolved for the establishment of uniform prices based on the use value of milk sold in the Boston market and for the operation of individual handler pools. This plan was put into effect in May 1932 and continued in operation through December 1932 (R. Vol. II, 131).

In January 1933 various cooperative groups met and attempted to work out a new plan for the Boston market (R. Vol. II, 131). The proposal which was finally adopted contemplated that the distributors should act as agents of the producers for the distribution of milk and should receive a commission for their services. A central sales agency was to handle the milk for the producers on a uniform price basis and a market-wide equalization pool was to be operated. Again the necessary producer assent was not obtained and the plan did not go into operation (R. Vol. II, 131–132). However, from June 1, 1933, until November 3, 1933, certain cooperative groups in the Boston market did market their milk through a central sales agency and these groups operated an equalization pool through which all producers whose milk was handled by them were paid on the basis of a uniform blended price (R. Vol. II, 132).

It is significant that all of the marketing plans proposed between 1930 and 1933 contemplated the use of a market-wide equalization pool.

7. *State Regulation.*—Numerous efforts have been made by the New England states to solve the problems connected with the marketing of milk in that area. The legislatures of Maine, New Hampshire, Vermont, and Massachusetts have all enacted laws providing for the regulation of marketing conditions, including the regulation of prices (for Maine, see ch. 13 of the Public Laws of 1935; for New Hampshire, see ch. 21, Laws of 1935; for Ver-

mont, see the Act of March 26, 1937; and for Massachusetts, see ch. 376, Acts of 1934, ch. 300, Acts of 1936, and ch. 428 of the Acts of 1937). The Milk Control Board of the Commonwealth of Massachusetts has promulgated an order fixing prices to be paid Massachusetts producers and otherwise regulating the handling of milk in the Boston marketing area (R. Vol. II, 136; R. Vol. III, 76).

V. The Provisions of Order No. 4 as Amended and Their Administration

Order No. 4 applies to all milk handled in the current of interstate commerce which is sold in the Boston marketing area. The order regulates all handlers who engage in such handling of milk sold in the area as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects interstate or foreign commerce in milk and its products.[18]

Article II of the order provides for the appointment by the Secretary of Agriculture of a Market Administrator to perform certain ministerial functions under the order. The appointment of a Market Administrator is authorized by paragraph (C), subsection 7, Section 8c of the Act. Pursuant to the statute, Samuel W. Tator was designated as Market Administrator under the order on August 1, 1937 (R. Vol. II, 137). The Market Administrator maintains an office and a staff of em-

[18] See Appendix B, Article I, Section 1.

ployees in Boston (R. Vol. II, 137). The expenses of his office and his staff are paid from the proceeds of the administration charge imposed by Article X of the order. (See pp. 4–41, *infra*.)

Article III of the order classifies milk according to the form in which it is sold. All milk sold as milk, chocolate milk, or flavored milk is classified as Class I milk, and all milk disposed of in other forms is classified as Class II milk (R. Vol. II, 42, 43).

Article IV of the order fixes a minimum price for Class I milk. The same article establishes a formula by which the Market Administrator calculates a price for Class II milk.[19] The provisions classifying milk or fixing a price for each classification are specifically authorized by paragraph (A), subsection (5), Section 8c of the Act. The prices fixed by Article IV are minimum and not maximum prices, and nothing in the order prevents a handler from paying a producer more than the minimum prices. Neither the Act nor the order purports to regulate the price at which the handler may sell milk.

The minimum prices fixed by Article IV are used for the purpose of computing the value of the milk

[19] The important components of the formula are the market price of cream in the Boston market and the market value of casein. The order divides each month into two delivery periods, one extending from the first to the fifteenth day of the month, and another from the sixteenth day to the last day of the month. A new Class II price is calculated for each delivery period.

which is delivered in a particular period by all producers to all of the handlers subject to the order. The order provides an effective and equitable method for distributing among all the producers to whom it belongs the amount of money thus computed. The method of payment provided by the order has two important aspects: (1) the payment of a blended price; (2) the making of so-called "equalization payments."

The blended price.—As it has been explained above, it is not possible to tell whether the particular milk delivered by a particular producer to a handler is disposed of as Class I or as Class II milk. Even in the absence of an order it would be necessary for the handler to pay to each producer a price which represents a composite of the value of all the milk which the handler disposes of in fluid form and the value of all the milk sold as surplus milk. Accordingly, the order provides for payment of a blended price to all producers. This blended price represents a blend of the value of both classes of milk and consequently is less than the Class I price and more than the Class II price. Statutory authorization for the payment of a blended price is found in subparagraph (5) of Section 8c of the Act, which provides that an order may establish a method for the payment by all handlers of uniform prices to all producers for all milk delivered, irrespective of the uses made of the milk by the handler.

The directions for computing the blended price are found in Article VII of the order (R. Vol. II, 47–48. The Master's report contains detailed findings with respect to the steps which the Market Administrator took in computing the blended price for each delivery period between August 1, 1937, and December 31, 1937 (R. Vol. II, 154–160). A simplified description of these steps follows: The Market Administrator computed the value of the milk used by each handler by multiplying the quantity of the milk which he disposed of for Class I purposes by the Class I price and the quantity of milk which he disposed of for Class II purposes by the Class II price. After the Market Administrator had computed the value of the milk disposed of by each handler, he added all of the values so computed for all handlers into one total which was the total amount of money to be distributed to all producers for all the milk which they had delivered in a particular period. The distribution of this total among the producers took into account certain differentials which are provided for in Article VIII of the order (R. Vol. II, 47–48). Statutory authorization for the differentials is found in paragraph (B), subsection (5), Section 8c of the Act. Briefly, the differentials recognize (a) the difference in the cost of transporting milk various distances to Boston and (b) the normal economic advantage enjoyed by producers whose farms are in close proximity to the city. After allowance was

made for the application of the differentials, the total amount of money available for distribution to distributors was divided by the total quantity of milk delivered, the result being the blended price which was paid to each producer subject to the differentials which were applicable to him.

Copies of the price announcements published by the Market Administrator for each delivery period between August 1, 1937, and December 31, 1937, are printed in the Record (R. Vol. III, 101, 156).

The equalization payments.—The purpose of providing for the payment to all producers of a blended price, reflecting the value of all of the Class II milk as well as the value of all of the Class I milk, is to distribute the burden of the surplus milk equitably over the entire market. The making of the equalization payments is an essential step in the accomplishment of this purpose. The Master's report also contains detailed findings with respect to the operation of the equalization provisions of the order (R. Vol. II, 160, 163). The more important of those findings may be summarized as follows: It has been explained that each handler pays to producers a blended price which is less than the Class I price and more than the Class II price as those prices are fixed in Article IV of the order. As a result, a handler who uses as Class II milk the greater part of the milk delivered to him pays to his producers an amount which is greater than the use value of that milk (which is the value of the milk computed on the basis of the minimum

class prices fixed by Article IV of the order). On the other hand, a handler who uses as Class I milk the larger part of the milk delivered to him pays to his producers less than the use-value of that milk. The latter handler, who has paid his producers less than the use value of the milk, is required by paragraph 3, Section 1, Article VII of the order to pay the difference between the use value and the blended price to the Market Administrator. The Market Administrator does not retain this money but pays it to handlers who, like the first handler described above, are required to pay to their producers more than the use value of the milk which has been delivered to them; and these handlers pay the money so received to their producers. These payments to and from the Market Administrator are so-called "equalization payments." Authority for the payments is found in paragraph (C), subsection (5), Section 8c of the Act. *It should be emphasized that the payments do not have the effect of equalizing profits among the several handlers in the market.* The money involved in the payments is money which represents a part of the value of the milk delivered by producers and which should be distributed among the producers; in other words, payments are merely an important step in the distribution of the total value of the milk among all the producers in the market.

Certain other provisions of the order should be briefly noted. Article IX of the order requires

each handler to deduct an amount not exceeding $ .02 per hundredweight from the payments made direct to producers. This money is used for certain valuable marketing services which are performed for producers by the Market Administrator. Those deductions are not made in the case of milk purchased or received from members of a cooperative association which performs such services for its members because performance of the services by the Market Administrator is unnecessary. This provision of the order is authorized by paragraph (E), subsection (5), Section 8c of the Act. These deductions are made from amounts which are owing to producers and therefore represent no additional cost to the handler.[20]

Section 1 of Article X of the order requires each handler to pay to the Market Administrator not exceeding $ .02 per hundredweight, on all milk delivered to him, as his *pro rata* share of the expense of administering the order. This provision of the order is authorized by Section 10b (2) of the Act. Article V of the order requires the handlers to make certain reports to the Market Administrator

[20] The amounts assessed for the marketing service charge were paid into court pursuant to the terms of the temporary injunction as modified by the supersedeas of the United States Circuit Court of Appeals. Inasmuch as the charge is for a service to be currently performed by the Administrator and the impounding of the money made it impossible for the services to be currently performed, the District Court directed that these funds should be turned over to the Market Administrator for distribution to the producers from whom the money was withheld (R. Vol. I, 126–127).

with respect to the quantity of milk handled and the purposes for which it is sold or distributed (R. Vol. II, 45). These reports are used to compute the blended price and the amounts of the equalization payments.

VI. The Business Carried on by Petitioners

A. H. P. Hood & Sons, Inc., and Noble's Milk Company

H. P. Hood & Sons, Inc., is a Massachusetts corporation which has its principal place of business in Boston. It operates receiving stations at different points in the States of Maine, New Hampshire, Vermont, and New York. It purchases milk from more than 3,000 producers located in the States of Maine, New Hampshire, Vermont, Massachusetts, and New York. A portion of the milk so purchased is transported to the distributing plant of the petitioner in Boston in interstate commerce and is there processed and then distributed and sold by the petitioner in the Boston market. Some of the milk purchased by the Hood Company is processed at its country stations outside of Boston and the products are then shipped into Boston. Of the 3,186 producers from whom the Hood Company purchased milk between August 1 to 15, 1937, 902 delivered to plants in the State of Maine; 473 to plants located in the State of New York; 1,367 to plants in the State of Vermont; 371 to plants in the State of New Hampshire; and 73 to the plant at Charlestown, Massachusetts. The

Hood Company also from time to time purchases milk from other handlers and distributes and sells that milk in the Boston market (R. Vol. II, 212–213).

Noble's Milk Company is a Massachusetts corporation which is a subsidiary of the Hood Company and is operated under the same general policy. It purchases milk from producers located in the State of Vermont who furnish a small proportion of its total supply. It also purchases milk from producers in the Commonwealth of Massachusetts, who furnish the greater proportion of its total milk supply. The milk from Vermont and Massachusetts producers is received and commingled at the plant of Noble's Milk Company at Shelburne Falls, Massachusetts. Noble's Milk Company sells its milk to the Hood Company, which distributes and sells it in the Boston market (R. Vol. II, 215–216).

B. THE WHITING MILK COMPANY

The Whiting Milk Company is a Delaware corporation which has its principal place of business in the City of Boston. It operates receiving stations in New Hampshire, Vermont, and Maine. The Whiting Company also receives milk from producers located in Middlesex and Worcester Counties in the Commonwealth of Massachusetts. The milk from the country receiving stations, as well as the milk purchased in Massachusetts, is ultimately sent to the Charlestown plant of the company from which the company sells the milk

in the Boston area and to some extent in secondary markets. The Whiting Milk Company buys milk from approximately 1,400 producers. From time to time it also purchases milk from other handlers and distributes and sells that milk in the marketing area (R. Vol. II, 226–231).

SUMMARY OF ARGUMENT

I

Neither the Agricultural Marketing Agreement Act of 1937 nor Order No. 4 as amended violates the due process clause of the Fifth Amendment. Petitioner's attack upon the equalization provisions of the order is essentially economic and not legal in character. It is an attack upon the wisdom and effectiveness of a regulatory device which Congress has expressly authorized and which has been adopted by the Secretary of Agriculture after full hearings and after exact compliance with the procedural requirements set up by the statute. In substance, petitioners are arguing that in selecting a regulatory plan Congress made an unwise and ineffective selection. This argument misconceives the nature of the limitations imposed by the Fifth Amendment. The concept of due process does not require this Court to determine questions of legislative wisdom or economic policy. *Nebbia* v. *New York,* 291 U. S. 502, 537; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 337–338; *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 46.

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The facts with respect to economic conditions in the Boston market show that a market-wide equalization plan is a fair, reasonable and practical method of preventing disorderly marketing conditions in interstate commerce in milk. Petitioners' contention that the equalization provisions take property from one class of persons for the benefit of another class is without merit. The provisions for market-wide equalization are closely analogous to the regulatory plan sustained by this Court in *Mulford et al.* v. *Smith,* No. 505, decided April 17, 1939.

II

The Agricultural Marketing Agreement Act of 1937 contains no unlawful delegation of legislative authority. The Act does not unlawfully delegate legislative power to the Secretary to determine when, where, and to what commodities an order shall apply. The standards set up to guide the Secretary's action are definite and comply with the principles laid down in the decisions of this Court. The statute does not confer unlimited power upon the Secretary to select the terms of an order. Such discretion as is permitted to the Secretary is necessary to provide the necessary flexibility in a regulatory statute which applies to a number of commodities and to different marketing areas. The power to select the terms and conditions to be included in the order is purely a delegation of authority to administer a legislative enactment and not a delegation of the authority to make law.

III

The Secretary of Agriculture in issuing the amendments to Order No. 4 complied with the procedural requirements set forth in the Agricultural Marketing Agreement Act of 1937. It is true that at the time the amendments were issued the Secretary did not promulgate a new proclamation pursuant to Section 8e as to the base period applicable to the amendments. In not taking this step the Secretary followed his consistent administrative interpretation of the Act. That interpretation should be sustained by this Court. *Costanzo* v. *Tillinghast*, 287 U. S. 341; *McCaughn* v. *Hershey Chocolate* Co., 282 U. S. 827. The provisions of the statute do not require that a proclamation be issued under Section 8e in connection with the issuance of amendments to an order. The Act merely grants to the Secretary the authority to do so when the circumstances warrant. However, in this case the facts demonstrate that the Secretary has complied with the requirements of the statute regardless of how it is interpreted.

The Secretary's determination that all of the terms and conditions of Order No. 4 as amended would tend to effectuate the declared policy of the Act was supported by the evidence before him. Petitioners have no standing to attack that finding by new evidence or on the basis of wholly *a priori* reasoning. The Secretary's determination was of such a nature that it is not properly subject to

judicial review. If this Court does consider the question it will be found that the determination is fully supported by the evidence regardless of the scope of the review.

Petitioners, in attacking the referendum used by the Secretary to gather information as to whether the requisite percentage of producers approved the issuance of the amendments to the order, are not entitled to judicial review of the results of that referendum or the manner in which it was conducted. The record before this Court amply demonstrates that the referendum was conducted in accordance with the directions contained in the statute.

In terminating the suspension of Order No. 4, the Secretary complied with the statutory requirements. Properly construed, the provisions of the statute did not require the Secretary to make a finding that the termination of his suspension of the order would tend to effectuate the purposes of the Act. This is particularly the case, where, as here, the suspension of the operation of the order was not accompanied by a finding that the order did not tend to effectuate the purpose of the Act. If, however, the statute required the Secretary to make any determination when he reinstated the order, he fully complied with the statutory requirement. The form of his order terminating the suspension, and the finding made, when he issued the amendments, that the order as amended would tend to effectuate the purpose of the Act, fully disclosed

the basis of his action and satisfied the procedural requirements of the statute.

IV

Petitioners' contention that the Market Administrator improperly included in the equalization pool milk of persons who were not producers within the meaning of the order is without merit. The asserted error inflicted no damage upon petitioners. The test which the Secretary of Agriculture and the Market Administrator applied to determine what producers should be included in the equalization pool was reasonable and the only practicable test available to him. The test insisted upon by petitioners would admittedly have made enforcement of the order impossible. The Secretary's construction of his own order is controlling in the absence of proof that the construction is arbitrary or unfair. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294.

ARGUMENT

I

THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 IS A CONSTITUTIONAL EXERCISE OF THE POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE

The petitioner in *Whiting Milk Company* v. *United States*, No. 809, urges that the Agricultural Marketing Agreement Act of 1937 and Order No. 4 as amended, in fixing prices to be paid for milk,

which is shipped in interstate commerce, constitute an invalid exercise of the power to regulate commerce and violate the Tenth Amendment. The general principles of constitutional law applicable to the issues raised by this contention are discussed at pages 93 to 109 of the brief filed by the United States in *United States of America* v. *Rock Royal Co-operative, Inc., et al.*, No. 771, and the Court is respectfully referred to that discussion. No additional argument will be made here except to point out briefly the applicability of the most recent pronouncements of this Court to the contentions made by petitioner.

Petitioner's argument does not differ substantially from the views urged upon this Court by the appellants in *Currin* v. *Wallace*, No. 275, decided January 3, 1939, and in *Mulford et al.* v. *Smith et al.*, No. 505, decided April 17, 1939. The decisions of this Court in rejecting those views are a complete answer to petitioner's argument. Mr. Justice Roberts, in speaking for the majority of the Court in *Mulford et al.* v. *Smith et al., supra*, said:

> This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce. *Currin* v. *Wallace, supra;* and see *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 290; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, 198. Compare *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50. Any rule, such as that em-

bodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, *Champion* v. *Ames,* 188 U. S. 321; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Hoke* v. *United States,* 227 U. S. 308; *Brooks* v. *United States,* 267 U. S. 432; *Gooch* v. *United States,* 297 U. S. 124, and a fortiori to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation. Story, Commentaries on the Constitution (4th Ed.), Secs. 965, 1079, 1081, 1089.

Petitioner concedes, in effect, that the regulation is a regulation of commerce by admitting that the transaction regulated is the sale of milk "about to be shipped in interstate commerce." That transaction is regulated by fixing the sale price. The necessary implication of the decision of this Court in *Milk Control Board* v. *Eisenberg Farm Products,* No. 426, decided February 27, 1939, is that such regulation is within the power of Congress. We submit that the Agricultural Marketing Agreement Act of 1937 and Order No. 4 as amended, are constitutional exercises of that power.

II

Neither the Agricultural Marketing Agreement Act of 1937 nor Order No. 4 as Amended Violates the Due Process Clause of the Fifth Amendment

Petitioners attack the equalization provisions of Order No. 4 as amended on the ground that they violate the due process clause of the Fifth Amendment. The general principles of constitutional law applicable to the issues raised by this contention are discussed at pages 124 to 130 of the brief filed by the United States in *United States of America* v. *Rock Royal Cooperative, Inc., et al.*, No. 771, and the Court is respectfully referred to that discussion. The argument here will be directed to certain considerations which are pertinent to the particular form in which petitioners have cast their arguments on this point.

Petitioners' contentions strike squarely at the provisions of the statute and are designed to compel the conclusion that the due process clause of the Fifth Amendment forbids the use of the market-wide equalization plan.[21] Petitioners' objections to the equalization provisions assume two

[21] Petitioners do not contend that the Act did not authorize the Secretary to include the equalization provisions in the order. Nor do they suggest that his action in so doing was arbitrary in the sense that it was without any support in the evidence which was adduced at the hearings held before the promulgation of the order.

forms: (1) That those provisions have no reasonable relation to the legitimate purpose of the statute, and (2) That they take the property of one group for the benefit of another.

The first contention is developed in some detail in the brief of the Hood Company. As there developed, the argument grants the existence of a constitutional power to fix minimum prices, assumes that conditions exist in the Boston market which call for the exercise of that power, and admits that the prices fixed by the order are not "unreasonably high or confiscatory." The petitioner asserts, however, that the evils which the Act was intended to remedy could have been dealt with effectively by an order which fixed minimum prices and provided for equalization on the basis of dealer pools; and that the market-wide equalization provisions are unnecessary to deal with the economic problems which admittedly exist in the Boston market.[22] The petitioner further objects that the equalization provisions of the present order compel

[22] The difference between a dealer pool and a market-wide pool is explained on pages 24–26 *supra*. The difference is not between equalization and no equalization, but between equalizing the sales of the producers delivering to a particular dealer on the basis of that dealer's utilization of his milk, and equalizing all the sales of all producers delivering to all dealers in the market on the basis of the utilization of all the milk so delivered. The distinctive characteristic of dealer-pool equalization is that it makes no attempt to distribute the burden of the surplus milk equitably over the market.

it to subsidize its competitors, encourage marginal dealers, and enable them to remain in business; and prevent the petitioners from paying prices to the farmers as high as it would like to pay.

This argument, whatever its form, is essentially economic and not legal in character. It is an attack upon the wisdom and effectiveness of a regulatory device which Congress has expressly authorized and which has been adopted by the Secretary of Agriculture after full hearings and after exact compliance with the procedural requirements set up by the statute. In short, petitioners are weighing the merits of alternative techniques for dealing with an economic problem, determining that one technique is better than another and concluding, on the basis of that determination, that Congress has made an unwise and ineffective selection.

This entire argument proceeds upon a misconception of the nature of the limitations imposed upon Congress by the Fifth Amendment. The methods which Congress may use to achieve a purpose within its granted powers are varied. One method may be preferable to another, and reasonable men may differ as to the efficacy or fairness of particular regulatory plans and devices. But the choice of methods is a legislative function. Whatever the scope of the Fifth Amendment may be, it does not compel the choice of any one method as against another, nor does it establish some absolute and abstract standard of excellence or wisdom to which regulatory plans and techniques must con-

form at their peril. In applying the concept of due process, this Court has repeatedly said that it has no concern with the questions of legislative wisdom or economic policy. *Nebbia* v. *New York*, 291 U. S. 502, 537; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337–338; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 46.

The record here affords no basis for the contention that the equalization provisions are capricious, arbitrary, or unreasonable, or that there is no rational basis for regarding them as bearing a real and substantial relation to the legitimate statutory object sought to be obtained. The earlier discussion of the history of the Boston market and of the economic conditions existing therein shows that the presence of a necessary but burdensome surplus of fluid milk depreciated farm prices and created disorderly marketing conditions in interstate commerce in milk in the Boston area.[23] The surplus supply is essential; without it the marketing area would not have an adequate supply of milk in seasons when production is low. But the handling of the surplus entails a substantial economic burden, and competitive pressure drives various groups of producers in the market and the different handlers to attempt to avoid any share of that burden. Since a year-round surplus is an inevitable incident of an adequate supply in short seasons, any fair plan designed to deal with marketing con-

[23] See pages 26–33, *supra*.

ditions should provide for equitable distribution of the burden of the surplus over all of those engaged in the industry.[24] That is precisely what the provisions for market-wide equalization do.

The facts disclosed by the record demonstrate the essential fairness and reasonableness of the market-wide equalization plan. Each of the marketing plans proposed since 1930 by various semi-public and private bodies to remedy conditions in the Boston market has contemplated the establishment of a market-wide equalization pool (R. Vol. II, 130–132). For a time in 1933 cooperative organizations, representing by far the greater number of producers supplying the Boston market, voluntarily adopted and followed a marketing plan which involved acceptance of the principle of market-wide equalization (R. Vol. I, 120–121, 132).[25] The fact that, of the 11,493 farmers voting

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[24] Compare the report of the joint legislative committee appointed by the legislature of New York to consider conditions in the dairy industry in that State, which was before this Court in *Nebbia* v. *New York*, 291 U. S. 502. One of the conclusions of the committee was summarized in this Court's opinion in these words (page 517):

> A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed.

[25] For additional material with respect to the history and development of marketing plans and of equalization in the Boston market, see *Report of Federal Trade Commission on the Distribution and Sale of Milk and Milk Products*, House Document No. 501, 74th Congress, Second Session,

in the referendum on the amendments to Order No. 4, 8367 voted in favor of the order is persuasive evidence of the essential fairness of the equalization provisions. Furthermore, some kind of equalization is inevitable whenever milk is marketed on the use-price plan.[26] Petitioners, in effect, concede that equalization is fair when applied solely to the producers delivering to petitioners. But if equalization is fair for all producers delivering to a particular handler, its fairness for all producers delivering to all handlers in the market must be admitted unless it is to be assumed that it is fair and reasonable to select some particular group of producers and compel

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pages 13–44, and *Relative Prices to Producers under Selected Types of Milk Pools*, Stitts and Gaumnitz, Bulletin No. 25, published by the Cooperative Division of the Farm Credit Administration in cooperation with the United States Department of Agriculture.

It is significant that the milk marketing plan adopted in England and Wales pursuant to the provisions of the Agricultural Marketing Act of 1931 (21 & 22 Geo. 5, c. 42) adopts the principle of market-wide equalization. It also provides to a limited degree for equalization between different marketing areas in England and Wales. See *The Regulation of Milk Marketing In England and Wales*, Steck, published September 1938 for the United States Department of Agriculture.

[26] The Master found (Record, Vol. II, 122):

> Because the milk of a particular producer is commingled with the milk of many other producers, the handler does not know to what use the milk of the particular producer is ultimately put. Some kind of an equalization or pooling device is therefore an essential part of any use price plan for purchasing milk, except when a handler is purchasing only for a single use.

them to bear the entire burden of the surplus milk. There is no justification for regarding these provisions as an arbitrary device imposed upon the market by governmental decree. They may more properly be described as a device which has been evolved from 20 years of experience in the Boston market and which the majority of the farmers of New England accept because of the lessons taught by that experience.

The facts which have been discussed above destroy petitioners' argument that equalization is arbitrary and unfair and reduce their arguments to bare criticisms of the economic effects of the regulatory plan which the Secretary has adopted. Criticisms of this kind, no matter how reasonable of themselves, are not a test of compliance with the due process clause of the Fifth Amendment. But if they were, they would be unavailing here because analysis shows that petitioners' criticisms are without substance. These criticisms proceed along two lines: (1) That the provisions deprive certain groups of producers of benefits which they would otherwise enjoy, and (2) That the provisions injure the handlers by compelling them to subsidize their competitors and by preventing them from paying their producers as high a price as they might otherwise pay. Each of these lines of approach involves comparison of the situation existing under the equalization provisions with some other situation. At points in petitioners' argument the situation

chosen for contrast appears to be one in which a federal order fixes minimum prices for farmers and provides for equalization on a dealer pool basis; at other points, one in which the market is entirely free of regulation of any kind. If the first situation is assumed, it can be shown that the regulatory scheme which petitioners insist the Constitution requires Congress to adopt is arbitrary, unfair, and probably impractical. In the second situation, it can be demonstrated that the benefits, whose destruction the petitioners lament, are entirely illusory.

Let us first consider the situation which would exist under a regulatory plan which fixed minimum prices for the farmer, permitted equalization on a dealer-pool basis, and did not provide for market-wide equalization. Petitioners assert that the effect of the plan would be to prevent the kind of price competition which has heretofore depressed the farm price of milk; and that the plan would thus achieve the only legitimate purpose which the statute was intended to serve.[27] In the past, in the absence of any regulation dealers have competed for the fluid milk market by cutting both the retail price of milk and the price to farmers. Under the regulatory scheme which petitioners propose, the kind of com-

[27] In short, this is an argument that the fixing of minimum prices is necessary and proper to achieve the legitimate statutory purpose, but that market-wide equalization is unnecessary. The question of *necessity* is for the legislature.

petition which involves cutting the farm prices of milk is impossible. Dealers, such as the petitioners, who now have a firm grasp on fluid milk outlets and who enjoy large fluid sales would to that extent be protected against competition. The farmers who now deliver milk to dealers who have small Class I sales would be excluded from the fluid milk market throughout most of the year. Such a regulatory plan would deny to these farmers the power to compete for fluid sales with the chief weapon which has heretofore been available. There is no evidence that the farmers who deliver to these dealers produce milk inferior in quality to that produced by the farmers who deliver milk to the petitioners and other handlers with high Class I sales (R. Vol. I, 97). There is no basis for suggesting that the farmers whose milk is now used chiefly for Class II purposes belong in any different economic class from the farmers who sell to handlers with large Class I sales.[28] Despite these considerations, petitioners proffer a regulatory plan which excludes these farmers from the fluid milk market and condemns them to receive a lower price for their milk. And this proffer is made not merely

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[28] On the contrary the Master found (R. Vol. II, 97):

> As to farmers delivering to such stations, no separate class of farmers in the Boston milkshed produces Class II milk.

The discussion of dealer pool equalization in this section of the brief is necessarily directed to conditions in the Boston market. The respondents do not suggest that there may not be conditions in other markets which make application of the dealer pool plan fair and appropriate.

on the basis that the plan is economically wise and desirable but on the additional ground that its adoption is demanded by the provisions of the Constitution.

The injustice of this proposal is apparent when it is remembered that the milk produced by these farmers is required at certain seasons of the year to insure an adequate supply of milk for the market. As it has been previously explained, the variations in production and demand make it necessary that there be a supply of surplus milk in the market at all times (see pp. 27, 28, *supra*). The supply of milk available for the Boston market is lowest in November. In that month the surplus is between 20% and 25% (see p. 27, *supra*). The number of cows which will produce this surplus in November will necessarily produce a much larger surplus in other months of the year. It is apparent from the record that it cannot be assumed that any considerable number of farmers now supplying the Boston market could be permanently excluded from that market without substantial risk of impairing the necessary fluid milk supply. For example, in November 1937 there was just enough milk in the market to supply the necessary surplus of 25% (R. Vol. II, 96).

Indeed, the Record here discloses that the petitioners themselves find it necessary to resort at times to the class of producers whose milk they appear to believe is unnecessary in the market. It

is conceded that the largest share of the surplus now existing in the Boston market is carried by the cooperative organizations of producers. Throughout the period between August 1 and December 31, 1937, it was necessary for both the Hood and Whiting Companies to purchase considerable quantities of milk from the cooperative organizations operating in the market (R. Vol. II, 215, 231). It may fairly be assumed that these purchases were made because the petitioners could not get an adequate supply of fluid milk from the producers delivering to them.

Thus, although the petitioners' suggested scheme of regulation would deny to a large number of producers supplying milk to the Boston market any share in the fluid milk market throughout most of the year, it would, unless the plan frankly contemplates impairment of an adequate supply of milk, expect these producers to continue to meet the strict and expensive health requirements applicable to the production of fluid milk and otherwise to hold themselves in readiness to supply fluid milk to the market at such times as their milk might be required. The prospects for fulfillment of this expectation can hardly be described as encouraging. No group of producers is likely to continue to produce milk for sale as fluid milk if its members are not to be allowed a share of the fluid milk market. Thus any regulatory plan which proposes that some one group shall bear the entire burden of the surplus in the market, quite apart from being

unfair and arbitrary, might well be impractical in the long run. Since the purpose of the statute is not to enhance the prices received by a favored group of producers but to establish a marketing plan which will prevent disorderly marketing conditions in interstate commerce and at the same time be fair to all groups of producers and insure an adequate supply of milk, the petitioners' proposed plan can under no circumstances be squared with the declared policy of Congress. Certainly nothing in the concept of due process requires Congress to select a certain class of farmers and handlers and to enact regulation which compels them to assume the entire burden of the surplus milk which is necessary to insure an adequate supply.

If, on the other hand, we assume that there is no regulation whatsoever in the market, the benefits which the petitioners assert the order destroys are illusory. In the absence of regulation the way is open for the kind of disorderly marketing conditions which the petitioners admit existed in the past and which the statute is intended to prevent. When these conditions exist, the producers delivering to the petitioners cannot expect to receive a price substantially higher than the price paid generally in the market.[29] Nor can the petitioners expect that competitive pressure will always permit them to pay the high prices which they

[29] Compare the statement in the Master's report (R. Vol. II, 98): "Each dealer naturally wishes to purchase his milk as cheaply as his competitors."

assert it is in their interest to pay. The Hood Company attempts to demonstrate the injury inflicted upon producers by the equalization provisions by contrasting the blended prices announced by the Market Administrator with the prices which the Hood Company has announced it will pay if it is not compelled to make equalization payments under the order. There is nothing in the record to support the assumption implicit in this argument that the Hood Company could pay the prices which it has announced in the absence of the order. On the contrary, the economic history of the market contradicts that assumption and points to the conclusion that the Hood Company was able to announce such prices only because the order protected it against the kind of competition which inevitably reduces the fair price of milk. The petitioners' argument on this point assumes a situation in which it is able to take advantage of the benefits of the order without assuming any of the corresponding obligations.[30]

Finally, petitioners assert that the equalization provisions take property from one class of persons

[30] The argument ignores another matter of some consequence. If the petitioners and the other handlers in the market had complied with the order and their milk had been included in the computation of the blended price, the price announced by the Market Administrator in each of the periods after September 1, 1937, would have been substantially higher. The difference between the blended prices computed on the basis of all of the sales in the market and the blended prices announced by the Hood Company would not be as great as petitioner's argument suggests.

for the benefit of another. This formula lays down no test for invoking the limitations of the Fifth Amendment. As applied by petitioners here it means nothing more than that the effect of the equalization provisions is to increase the financial burden of some persons and to improve the economic situation of others. The same thing might be said of minimum wage statutes, although it is now settled that such legislation does not violate the concept of due process. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379. With equal force the requirement that handlers pay minimum prices can be described as taking property from them for the benefit of the farmers. Yet the Hood Company in effect concedes that the fixing of minimum prices is consistent with the due process clause, as indeed it must. *Nebbia* v. *New York,* 291 U. S. 502. This concession removes any magic which the petitioners' incantation might otherwise possess. If Congress can compel petitioners to pay more for milk than they would otherwise pay (and thus take their property for the benefit of the farmers), no additional taking is involved in the equalization provisions for they merely effect a distribution of the fund created by the imposition of the minimum prices.[31]

[31] No basis exists for asserting that equalization takes any property belonging to the farmers who deliver to petitioners. These farmers have no fixed expectation of any particular price which can be taken from them by regulation. In the absence of regulation they would doubtless receive whatever price petitioners saw fit to pay, the bargaining position of

One who asserts that a statute violates the due process clause of the Fifth Amendment assumes the burden of demonstrating that the statute is arbitrary, unreasonable, or capricious. That burden is not discharged by proof that the effect of the statute is to confer benefits upon some groups at the expense of others. On the contrary, this Court has repeatedly recognized that when evils to which legislation is addressed are common to an entire industry, the regulation designed to remove those evils may impose burdens upon all groups within the industry even though some of those groups theretofore may have been able, either by reason of their own competence or fortuitous circumstances, to escape the consequences of the evils. Cf. *New England Divisions Case,* 261 U. S. 184; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *New York Central Railroad Co.* v. *White,* 243 U. S. 188; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Abie State Bank* v. *Bryan,* 282 U. S. 765; *Dayton-Goose Creek Railway* v. *United States,* 263 U. S. 456 452.[32]

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the farmers being what it is, as contrasted with that of petitioners. The history of the market suggests that in these circumstances the farmers delivering to petitioners would get prices, if not lower, at least no higher than the blended prices payable under the order.

[32] These decisions are discussed in detail on pages 124–129 of brief submitted by the United States in the case of *United States of America* v. *Rock Royal Co-operative, Inc., et al.,* No. 771. The petitioners attempt to distinguish these cases on various grounds. The asserted distinctions possess vary-

In one of its most recent decisions with respect to the constitutional power of Congress to enact regulatory legislation, this Court sustained the constitutionality of those provisions of the Agricultural Adjustment Act of 1938 [33] which provided for the establishment of marketing quotas in interstate commerce in flue-cured tobacco. *Mulford et al.* v. *Smith et al.*, No. 505, decided April 17, 1939. The purpose of that regulation was to remedy disorderly marketing conditions which existed in the interstate marketing of tobacco—conditions which were created by the periodic existence of a surplus supply of tobacco. The particular regulatory plan used involved the fixing of a marketing quota for each farmer and the imposition of a heavy monetary penalty for shipments in interstate commerce in excess of the quota. If, as in that case, Congress can equalize the burden of the surplus of an agricultural commodity by limiting the farmers' right to unrestricted access to the market, it can certainly equalize a similar burden here by permitting unrestricted access to the market and providing a fair method for the equitable distribution of the proceeds of the commodity sold.

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ing degrees of merit, but none of them obscures the fact that the statutes upheld served to equalize or distribute in some equitable way the economic burdens incident to the conduct of the industry involved.

[33] 52 Stat. 31, as amended March 26, 1938, 52 Stat. 120, April 7, 1938; 52 Stat. 202, May 31, 1938, 52 Stat. 586, and June 20, 1938, 52 Stat. 775; U. S. C. Supp. IV, Title 7, Secs. 1281, *et seq.*

The statement that property cannot be taken from one class of persons for the benefit of another is doubtless a convenient form of words for describing a conclusion, but it is the statement of a result and not of a reason. The generalization cannot be taken from the context in which it is used in judicial opinions and applied mechanically to other situations involving different legislation and different economic problems.[34] The real issue in each case is whether the purpose which Congress intends to accomplish lies within the scope of its granted power and whether the method which it has adopted appears to bear any reasonable relation to the purpose sought to be achieved. In the case at bar the purpose of Order No. 4 as amended is to remove disorderly marketing conditions which

[34] Petitioners' reliance upon the decisions in *Thompson et al.* v. *Consolidated Gas Utilities Corp. et al.*, 300 U. S. 55 and *Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U. S. 330, rests upon this kind of rigid legalism. Those decisions have been distinguished at pages 128–130 of the brief filed by the United States in *United States of America* v. *Rock Royal Co-operative, Inc., et al.*, No. 771, and elaboration of the discussion there contained is unnecessary. It may be worth while, however, to point out that here we have a situation in which the undesirable economic conditions intended to be remedied arise by reason of competition which ensues from unrestricted access to the fluid milk market. The application of the principle of equalization to such a situation is obviously different from its application to the situation in *Thompson et al.* v. *Consolidated Gas Utilities Corp.*, where one group had no access to the market and where there was no proof that denial of that access created economic conditions which it was within the power of the state legislature to remedy.

afflict interstate commerce in milk in the Boston market. The constitutionality of that purpose is not seriously contested. The reasonableness of the method used is shown by the lessons of experience, by the obvious efficacy of the method, and by its essential fairness and equity.

III

The Agricultural Marketing Agreement Act of 1937 Contains No Unlawful Delegation of Legislative Authority

The government's brief in *United States* v. *Rock Royal Cooperative, Inc.*, No. 771, demonstrates (pages 117–119) that the provisions of the Act, requiring the Secretary to find that a specified percentage of producers approve an order, contain no unlawful delegation of legislative power to producers. That point will not be discussed further here.

That brief points out also (pages 109–116) that the Act both states the policy Congress seeks to attain and prescribes standards to guide the Secretary in the attainment of that policy in terms more definite than those of other laws which this Court has sustained in the face of attack on grounds of unlawful delegation of legislative power to administrative officials. The Hood Company, however, urges this latter proposition at some length in its brief. Accordingly, although we believe the point clear, it may be helpful to a full appreciation of the forcelessness of the petitioners' contentions as

applied to this Act if we elaborate somewhat the argument advanced in the *Rock Royal* brief.

The petitioners rely upon *A. L. A. Schechter Corp.* v. *United States,* 295 U. S. 495, and *Panama Refining Co.* v. *Ryan,* 293 U. S. 88, only to the extent that they announce a principle. Although asserting that this case resembles the *Schechter* case more closely than it does the *Panama Refining* case, the petitioners admit that the means for the attainment of the objective in the *Schechter* case were undefined and broader than the means available under this Act. Petitioners' elaborate effort to bring this case within the doctrine of those cases, by showing that the objective of parity prices prescribed in this Act is as vague as the general purposes of the National Industrial Recovery Act involved in those cases, succeeds only in demonstrating that the standard here is more precise than the objectives and the guides to administrative action sustained by this Court in *Hampton & Co.* v. *United States,* 276 U. S. 394.

The petitioners' claim, in summary, is merely that the objective of parity prices for milk, although apparently precise, is illusory and therefore inadequate as a guide to the administrative determinations required by the Act as to (1) when an order shall be issued; (2) the commodities and regions to which it shall apply; and (3) the terms which it shall contain. On this premise the petitioners base their attack principally upon the third of these contentions—that because the Act gives

the Secretary a limited choice of methods for attaining this objective rather than confining him to but one set of invariable terms, it confers upon him a discretion so broad as to constitute an unlawful delegation of legislative power. This argument rests largely, but not entirely, upon the adequacy of the declared policy as a standard. Following the outline of the petitioners' argument, we shall discuss first its adequacy as a guide to when, where, and to what commodities, an order shall be applied.

A. THE ACT CONTAINS NO UNLAWFUL DELEGATION OF LEGISLATIVE POWER TO DETERMINE WHEN, WHERE, AND TO WHAT COMMODITIES AN ORDER SHALL APPLY

Section 8c (2) lists six agricultural commodities and their products as appropriate subjects of regulation. The petitioners say the Act fails to tell the Secretary how he shall choose one of these commodities for regulation or determine when he shall make the regulation effective or where it shall apply. But Section 8c (3) makes it clear that when the Secretary has reason to believe that the issuance of an order will tend to effectuate the declared policy with respect to any of the specified commodities or a product thereof, he shall give due notice and an opportunity for hearing upon a proposed order. This commences the process of issuing an order. Section 8c (4) provides that if he finds upon the evidence introduced at the hearing that the issuance of the order and all of its terms

and conditions will tend to effectuate the declared policy he shall issue the order. These provisions clearly fix the standard for ascertaining the time when an order shall be issued and the commodity to which it shall apply.[35]

The Secretary has constantly available current information regarding all of the factors involved in the determinations which these sections require to be made in initiating orders. If at any time this information discloses that facts exist which show a reasonable likelihood that the issuance of an order containing terms specified in the Act would tend to accomplish, with respect to any one of the specified commodities in an established marketing area, the purposes specified in Section 2 of the Act, as modified by Sections 8e and 8c (18), the Secretary is required to hold hearings, make findings and, if the findings support the issuance of an order, to issue an order. The intention of Congress is clear that the order shall be issued when, and only when, the facts exist which will justify its issuance and the Secretary's duty is clear to keep informed as to the facts and to act when the appropriate facts appear.

A similar, though less precisely expressed, procedure for initiating administrative action was held an adequate standard for determining when action should be taken and the commodities to which it

[35] Read in conjunction with other provisions of the Act to which we shall refer hereafter (see p. 73–84) these provisions indicate equally clearly the regions to which the orders shall apply and the terms it shall contain.

should apply in *Hampton & Co.* v. *United States*, 276 U. S. 394 at page 405.[36] As this Court pointed out in the opinion in that case:

> *There was no specific provision by which action by the President might be invoked under this Act, but it was presumed that the President would through this body of ad-*

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[36] The provision considered in that case was section 315 of the Flexible Tariff Act of 1922, c. 356, 42 Stat. 858, 941, which provided as follows:

"Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act. * * *

"(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it prac-

visers keep himself advised of the necessity for investigation or change, and then would proceed to pursue his duties under the Act and reach such conclusion as he might find justified by the investigation, and proclaim the same if necessary. [Italics supplied.]

It is clear from the Act that the Secretary has no unfettered discretion as to when an order shall be issued with respect to a particular commodity, but on the contrary is directed to issue an order whenever the appropriate facts appear.

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ticable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when the determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same.

* * *"

Petitioners claim also that the Act does not make clear where such orders shall apply. But Section 8c (11) (A) prohibits the Secretary from issuing an order applicable to all marketing areas unless he finds that the issuance of separate orders applicable *"to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product* would not effectively carry out the declared policy." Obviously, in this provision Congress recognized that it was dealing with commodities having established regional market practices which were too well defined to require particular description. The intention of Congress is clear that the orders are to be applied to these preexistent marketing areas and are not to be applied nationally unless the declared policy cannot effectively be carried out by regional orders for the established areas. This intention is emphasized by Section 8c (11) (C) which requires differentiation in the terms of orders applicable to different areas in order to "give due recognition to the differences in production and marketing of such commodity or product in such areas." The fact that Congress refrained from unnecessarily encumbering the Act with a recital of the geographical boundaries of each of many recognized marketing areas for the six commodities and their products is evidence merely of a sensible economy of words, not of an

unlawful delegation of legislative power. Congress was writing a law to be administered by experts acquainted with agricultural marketing. To describe the areas was obviously unnecessary to an adequate expression of the congressional intention. Like the determination of the time when an order should be issued and the commodities to which it should apply, the determination of the area to which it shall apply is to be determined primarily by reference to the declared policy but with regard to local conditions and to the relative effectiveness of regional and national orders. These are surely matters for expert administrative determination.

But the petitioners contend that whatever definiteness there might be in these standards for selection of the commodity to be subject to an order, the time when the order shall be effective, and the area to which it shall apply are illusory because the objective toward which the orders are directed and the effectuation of which guides these determinations appears to the petitioners to be difficult of application. Petitioners' argument amounts to no more than this. Although the petitioners' description refrains from minimizing these alleged difficulties, the argument would not be persuasive even if they all existed in the degree petitioners imply.

A similar argument was made with great force and at great length in the attack made upon the provisions of Section 315 of the Flexible Tariff

Act in the *Hampton* case.[37] In that case the Court pointed out that despite the difficulties of application the objective was clear, intelligible, and sustained the delegation as a valid device of practical government under the Constitution, saying (276 U. S. at p. 404):

> * * * It seems clear what Congress intended by § 315. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost

[37] The brief of the petitioner in that case, No. 242, October Term 1927, asserted at length in the text and the appendices the difficulties inherent in determining such factors as "difference between cost of production at home and abroad" (pp. 30–36) cost of joint products (pp. 36–42) and "any other advantages or disadvantages in competition" (pp. 47–52). See also Larkin, *The President's Control of the Tariff*, especially pages 112–150, in which are fully described the difficulties encountered by the Tariff Commission in applying the standards provided by Section 315 of that Act; in ascertaining "the differences in cost of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries"; in finding the "differences in cost of production in the United States and the principal competing foreign country;" in determining which were, at any particular time, the principal competing countries; in determining the time for which the comparative cost study should be made; in the selection of production areas; in evaluating the weight to be given to costs of marginal producers; in determining whether to use weighted average of bulk line costs; in breaking down joint costs; in determining what goods are "like" or similar; in ascertaining proper allowance for loss and depreciation, labor expenses and transportation as elements of cost; and

of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, * * *. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible. Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. * * *

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otherwise applying the standard. With these practical administrative difficulties apparent the Court found no objection to the adequacy of the standard as a guide to administrative action. They are infinitely greater difficulties than any which the petitioners suggest in the basic parity formula in this case.

The difficulties of applying the parity price formulae, which form the basic objective sought to be attained through orders issued under this Act, are obviously less than those involved in adjusting tariff rates under the Flexible Tariff Act.

The factors to be considered under Section 8c (18) in varying the objective from this mathematical parity, "feed supplies" and "feed prices" and "other economic conditions which affect market supply and deman dfor milk or its products" are factors capable of ascertainment through the information available to the Secretary and the effect of which upon the reasonableness of the prices and upon the maintenance of adequate quantities of milk can readily be determined. They express a clear congressional policy and point out the factors to be taken into account in determining the intended variation of the basic parity standard.

The same is true of the limiting factors expressed in Section 2 of the Act. Moreover, as pointed out in our brief in *United States* v. *Rock Royal Cooperative, Inc.*, pp. 113–114, the latter factors merely impose a restraint upon the Secretary's action and tend to diminish the rigor of any regulation which might be imposed in their absence.

The petitioner claims that the objective and governing standard to be ascertained on the basis of these facts is not capable of ascertainment because certain of the factors involved are "unknown and

unknowable" and "exist only in the abstract." If this be true (and we believe it clearly is not true) the petitioners' argument proves too much. If these factors, which Congress directs the Secretary to consider in issuing an order, are unknown and unknowable to the Secretary whose sources of information are the best available and are constantly at hand, the remedy which the petitioners appear to suggest of having Congress itself, although lacking the constant sources of information available to the Secretary, determine these "unknown" and "unknowable" facts would create an intolerable result and make the Act wholly unworkable.

Mere difficulty of finding the requisite facts does not invalidate a standard which, as this standard does, expresses a clear basic congressional policy and prescribes directions and limits to guide the action of the administrative officer required to carry out that policy.

B. THE ACT CONTAINS NO UNLAWFUL DELEGATION OF LEGISLATIVE POWER TO SELECT THE TERMS OF AN ORDER

The petitioners contend that, assuming that the objective which guides the initiation of orders with respect to particular commodities and particular regions is adequate to point the way for such action, nevertheless the Act is invalid because the Secretary is given choice of terms to be included in orders, or, as petitioners say, a choice of the

means of regulation. As we have pointed out in our brief in *United States* v. *Rock Royal Cooperative, Inc.*, the statute prescribes in Sections 8c (5) and 8c (7) specific terms which orders may contain. The petitioners suggest that these terms provide the basis for variations by the Secretary in the method of accomplishing the Act's objective so great as to constitute an unlawful delegation of legislative power. The argument fails to recognize that the choice permitted among even the limited terms specified in those sections is not capricious or unrestrained. It is clear from Section 8c (4) that before issuing an order the Secretary is required to find and to set forth in the order that all of the terms of the order will tend to effectuate the declared policy of the Title with respect to the commodity in the region to which the order by its terms applies. And Section 8c (11) (C) makes it clear that Congress intends the Secretary to select from among the specified terms, different terms applicable to different marketing areas as he "finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas." The petitioners urge that any of the terms would serve to accomplish the declared policy under the conditions which exist in any of the areas to which orders might apply. Congress apparently felt differently. The choice of terms was given, as is apparent from Section 8c (11) (C), in order to enable the Secretary to adapt the orders to local

differences in conditions, which Congress deemed prevalent, in the several areas to which orders might apply. Even if the petitioners' judgment as to the need for different remedies for different conditions were presumptively more sound than that of Congress, it provides no basis for overthrowing this Act. Congress has concluded that different conditions in different areas may require different remedies to accomplish the declared policy most effectively. The wisdom of this conclusion is not for this Court to decide on the mere representation of the petitioners that the conclusion is unwise. Congress has given the Secretary a choice of remedies and has instructed him to apply those remedies in the manner necessary to accomplish a clearly ascertained purpose with due regard to differences in the local conditions in which the Act is to be applied. This is the essence of delegation to an administrative officer of authority to find the facts and apply the law to the facts found. Cf. *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394.

Petitioners seek to illustrate their objection by a comparison between the effectiveness of a dealer equalization pool and a market-wide pool (Section 8c (5) (B)). Petitioners claim that the maintenance of prices approaching the parity objective is accomplished by the minimum price provisions alone and that the declared policy does not guide the choice of equalization methods because the policy is directed only to the purchasing power of

commodities, whereas the equalization devices, they say, affect not the maintenance but only the distribution of that purchasing power. Aside from the fact that this argument ignores the purpose to assure adequate supplies of wholesome milk (Sec. 8c (18); this argument falls far short of a complete analysis. It should be noted at the outset that, whatever may be the effect of the minimum price requirements upon handlers, the distribution of the differences in the price among producers in order to equalize the return to all producers for the same quantity of milk takes from the handlers no profits which they would receive independently of such equalization provisions. With class prices in effect without equalization the dealers would get none of the money which, through the equalization provision is redistributed among producers. The equalization pool merely provides the means for apportioning equally among the producers the prices paid for milk of similar quality irrespective of how a particular producer's milk happens to be used.

As is illustrated in our brief in *United States* v. *Rock Royal Cooperative, Inc.* (see pp. 106–109, 124–130 and the footnote, p. 107 of that brief), a classified price plan without equalization is vulnerable to competition between producers for the market for milk in higher price classes. The equalization plan is essential to the effectiveness of the price plan. It is inaccurate to say in these circumstances

that "the alternative equalization devices have to do *only* with the distribution of that purchasing power." They accomplish that distribution, but in doing so they form an integral and necessary element of the regulation necessary to accomplish the approach toward parity prices which the Act contemplates. In this sense, they are as essential to the accomplishment of the declared policy as the minimum-price provisions themselves. Neither could be effective independently. Therefore, the choice of two available methods of equalization cannot be divorced from the accomplishment of the Act's declared purpose. It cannot be said that Congress gave the power of capricious choice, unrelated to the declared policy in authorizing the Secretary to find, if the facts warrant the finding, that, as applied to conditions in one marketing area, equalization through a dealer pool would be more effective to support the maintenance of the prescribed minimum prices than market-wide equalization, whereas under conditions prevailing in other local areas, with different marketing practices and different competitive conditions, market-wide equalization might be effective where dealer equalization would fail. Petitioners' argument is based on an obvious failure to appreciate the essential interrelation between the minimum-price provisions and the equalization provisions as complementary elements both necessary to the effective accomplishment of the Act's purposes. Once their essential character is observed, the basic unsound-

ness of the petitioners' claim that the choice between the two methods is irrelevant to the accomplishment of the declared policy becomes obvious and the fact becomes apparent that the declared policy is a plainly relevant primary standard to guide the Secretary to the choice of the term appropriate to the local conditions.

The same is true as to the other terms. The Secretary's only leeway is to determine on the basis of evidence introduced at a hearing at which all parties interested have opportunity to be heard, which of the limited number of terms prescribed by the Act will, in the circumstances prevailing on the market to which the order is to apply, serve to make the order effective to accomplish the declared policy. This is purely delegation of authority to administer a legislative enactment, not a delegation of authority to make law.

Petitioners seek to draw a contrast between the standards prescribed in this Act and those considered by the Court in *Mulford* v. *Smith*, No. 505, decided April 17, 1939. There are obvious differences between the two statutes, differences reasonably related to differences in the problem dealt with. But here, as in that case, it is apparent that Congress has not delegated power to choose the policy but rather has outlined a comprehensive program to be administered. Congress here has fixed the policy and directed that it be carried out when and where facts are found to exist which require the prescribed action. Petitioners

say that in this Act Congress has merely fixed the ultimate goal, and add an intricate expression of doubt even as to that. We believe it is clear that the Act has not only fixed the goal but has specified when and where the Secretary shall act with respect to each commodity subject to regulation and has specified, with clarity amply sufficient to guide administrative action, what that action shall be.

IV

The Amendments to Order No. 4 Were Validly Promulgated by the Secretary of Agriculture in Compliance with the Provisions of the Agricultural Marketing Agreement Act of 1937

A. The Secretary did not err in omitting to issue a new proclamation pursuant to section 8e when he issued the amendments to the order

Under the provisions of Section 2 (1) of the Act, the base period applicable to all orders relating to milk is August 1909 to July 1914. However, Section 8e of the Act provides:

> In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the pur-

> poses of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

On January 25, 1936, the Secretary found and proclaimed that the purchasing power of the milk in the greater Boston marketing area during the base period August 1909 to July 1914 could not be satisfactorily determined from available statistics in the Department of Agriculture, but that the purchasing power of such milk could be satisfactorily determined from available statistics in the Department of Agriculture for the base period August 1919 to July 1929; and that the base period August 1919 to July 1929 should be the base period used for the purpose of the execution of a marketing agreement and the issuance of an order (R. Vol. II, 6–7). There is no dispute that in accordance with this proclamation the period August 1919 to July 1929 was established as the applicable base period for the purpose of issuing Order No. 4 in its original form.

When the Secretary promulgated the amendments to Order No. 4 he did not issue a new proclamation in regard to the base period, nor did he change or modify in any respect the base period used for the purposes of the order. Petitioners contend that since the Secretary concededly used

the same base period, August 1919 to July 1929, for the purposes of the amendments as he used for the purposes of the original order, the amendments are invalid because no new proclamation was issued in connection therewith. Petitioners reach this conclusion by interpreting Section 8c (17) to mean that no amendment to an order which uses the August 1919–July 1929 base period can be promulgated unless a new determination is made and a new proclamation issued pursuant to Section 8e.

1. The procedure followed by the Secretary was in accord with his considered administrative interpretation of the statute

The respondents submit that the provisions of the statute did not require the Secretary of Agriculture to make a new determination as to the base period when he amended Order No. 4. But before the merits of petitioners' argument on this point are considered, it should be pointed out that the Secretary did not *inadvertently* omit any procedural step in connection with the issuance of the amendments to Order No. 4. By not issuing a new proclamation as to the base period in connection with the amendments, the Secretary conformed to the procedure consistently followed in amending similar orders issued under the provisions of Section 8c enacted by Congress on August 24, 1935 (49 Stat. 750) and reenacted in the Agricultural Marketing Agreement Act of 1937. Consequently, it must be assumed that the procedure

followed by the Secretary was in accord with his considered administrative interpretation of the provisions of the statute.

Since the enactment of Sections 8e and 8c (17) [Act of August 24, 1935; 49 Stat. 750], the Secretary has issued 35 orders regulating the handling of agricultural commodities. In the 13 orders regulating milk the Secretary, pursuant to Section 8e, has proclaimed that either all or a portion of the period August 1919–July 1929 should be used as the base period.[11] The Secretary has issued similar

[11] These milk orders, the dates of their proclamations, and the dates of their issuance, are as follows: Order No. 3, for St. Louis, Mo., proclamation dated January 28, 1936, order issued January 30, 1936 (not contained in Federal Register which began publication on March 14, 1936); Order No. 4, for Boston, Mass., proclamation dated January 25, 1936, order issued February 7, 1936 (not in Federal Register); Order No. 5, for Fall River, Mass., proclamation dated April 3, 1936 (1 Fed. Reg. 112), order issued April 15, 1936 (1 Fed. Reg. 200); Order No. 11, for the District of Columbia, proclamation dated September 8, 1936 (1 Fed. Reg. 1329), order issued September 17, 1936 (1 Fed. Reg. 1401); Order No. 12, for Dubuque, Iowa, proclamation dated August 17, 1936 (1 Fed. Reg. 1125), order issued September 17, 1936 (1 Fed. Reg. 1375); Order No. 13, for Kansas City, Mo., proclamation dated June 17, 1936 (1 Fed. Reg. 607), order issued November 3, 1936 (1 Fed. Reg. 1722); Order No. 20, proclamation dated September 24, 1937 (2 Fed. Reg. 1943), order issued November 9, 1937 (2 Fed. Reg. 2443); Order No. 22, for Cincinnati, Ohio, proclamation dated March 22, 1938 (3 Fed. Reg. 630), order issued April 27, 1938 (3 Fed. Reg. 817); Order No. 27, for New York, N. Y., proclamation dated August 5, 1938 (3 Fed. Reg. 1957), order issued August 5, 1938 (3 Fed. Reg. 1945); Order No. 30, for Toledo, Ohio, proclamation dated

proclamations in connection with 15 orders regulating commodities other than milk.[39] In connec-

July 30, 1938 (3 Fed. Reg. 1893), order issued September 3, 1938 (3 Fed. Reg. 2169); Order No. 32, for Fort Wayne, Ind., proclamation dated October 27, 1936 (1 Fed. Reg. 1690), order issued October 11, 1938 (3 Fed. Reg. 2464); Order No. 34, for Lowell-Lawrence, Mass., proclamation dated January 21, 1939 (4 Fed. Reg. 403), order issued February 6, 1939 (4 Fed. Reg. 601); Order No. 35, for Omaha-Council Bluffs, Neb., proclamation dated March 10, 1939 (4 Fed. Reg. 1198), order issued March 31, 1939 (4 Fed. Reg. 1408).

[39] Order No. 2, regulating California citrus, proclamation dated November 15, 1935, order issued January 4, 1936 (not in Federal Register); Order No. 6, regulating western Washington vegetables, proclamation dated February 28, 1936 (not in Federal Register), order issued April 29, 1936 (1 Fed. Reg. 301); Order No. 7, regulating Florida citrus, proclamation dated March 10, 1936 (not in Federal Register), order issued May 4, 1936 (1 Fed. Reg. 334); Order No. 8, regulating Southeastern watermelons, proclamation dated February 28, 1936 (not in Federal Register), order issued May 8, 1936 (1 Fed. Reg. 389); Order No. 9, regulating California deciduous, proclamation dated May 23, 1936 (1 Fed. Reg. 448), order issued May 23, 1936 (1 Fed. Reg. 448); Order No. 10, regulating Colorado vegetables, proclamation dated March 14, 1936 (not in Federal Register), order issued August 4, 1936 (1 Fed. Reg. 1003); Order No. 14, regulating Utah onions, proclamation dated December 4, 1936 (1 Fed. Reg. 2100), order issued April 22, 1937 (2 Fed. Reg. 740); Order No. 15, regulating Texas citrus, proclamation dated July 9, 1937 (2 Fed. Reg. 1188), order issued July 9, 1937 (2 Fed. Reg. 1188); Order No. 16, regulating Oregon cauliflower, proclamation dated March 5, 1937 (2 Fed. Reg. 502), order issued July 19, 1937 (2 Fed. Reg. 1253); Order No. 24, regulating California and Arizona cantaloupes, proclamation dated May 17, 1938 (3 Fed. Reg. 959), order issued May 17, 1938 (3 Fed. Reg. 960); Order No. 25, regulating Arkansas grapes, proclamation dated July 15, 1938 (3 Fed. Reg. 1741), order issued July 15,

tion with various ones of the 28 orders employing either all or a portion of the August 1919–July 1929 base period, 12 amendments have been issued.[40] In only one instance did the Secretary issue a proclamation relative to the base period in connection with the amendment and that was necessary because the Secretary *changed* the portion of the base period employed in the original order. In amending Order No. 15, regulating Texas citrus fruits, the Department of Agriculture, after issuing the original order, acquired statistics which made more feasible the use of a different portion of the base

1938 (3 Fed. Reg. 1741); Order No. 26, regulating Washington prunes, proclamation dated July 19, 1938 (3 Fed. Reg. 1779), order issued July 19, 1938 (3 Fed. Reg. 1779); Order No. 29, regulating honey bees, proclamation dated September 2, 1938 (3 Fed. Reg. 2163), order issued September 2, 1938 (3 Fed. Reg. 2149); Order No. 31, regulating Western fresh pears, proclamation dated October 7, 1938 (3 Fed. Reg. 2489), order issued October 7, 1938 (3 Fed. Reg. 2439); Order No. 33, regulating Florida citrus, proclamation dated February 17, 1939 (4 Fed. Reg. 989), order issued February 17, 1939 (4 Fed. Reg. 971).

[40] Order No. 2, amended June 5, 1936 (1 Fed. Reg. 549); Order No. 3, amended April 13, 1936 (1 Fed. Reg. 185), and March 29, 1937 (2 Fed. Reg. 616), and March 31, 1939 (4 Fed. Reg. 1404); Order No. 4, amended July 28, 1937 (2 Fed. Reg. 1331), and January 13, 1939 (4 Fed. Reg. 249); Order No. 5, amended March 29, 1937 (2 Fed. Reg. 614); Order No. 7, amended October 24, 1936 (1 Fed. Reg. 1662); Order No. 11, amended November 17, 1936 (1 Fed. Reg. 1979); Order No. 12, amended February 24, 1937 (2 Fed. Reg. 354); Order No. 15, proclamation dated September 10, 1938 (3 Fed. Reg. 2222), amendment dated September 10, 1938 (3 Fed. Reg. 2222); Order No. 20, amended August 15, 1938 (3 Fed. Reg. 2015).

period August 1919–July 1929. Accordingly, the Secretary amended the order and in connection therewith proclaimed the different period (3 Fed. Reg. 2222). This is in no way inconsistent with the settled policy of issuing no new proclamation in connection with amendments *which do not entail a departure from the base period employed in the original order.*

It is a well-established principle of statutory construction that settled administrative interpretation is entitled to great weight when a court is called upon to construe a statute. *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 13–14; *Hewitt* v. *Schultz*, 180 U. S. 139, 156–157; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345. This doctrine is particularly applicable to the instant case because between the time of the enactment of Sections 8c (17) and 8e in the Act of August 24, 1935, and the reenactment without amendment of those same provisions on June 3, 1937 (Agricultural Marketing Agreement Act of 1937), the Secretary promulgated seven amendments to orders which had been issued on the August 1919–July 1929 base period. (See fn. 40, *supra*, p. 89). In not one of these seven instances did the Secretary issue a new proclamation in connection with the amendment. Although Congress must be presumed to have known of the administrative construction of the statute, it did not see fit to revise that construction. Mr.

Justice Stone, speaking for a unanimous court, in *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, said (p. 492–493):

> The reenactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed. See *National Lead Co.* v. *United States*, 252 U. S. 140, 146. We see no reason for rejecting that construction.

Again, in *Costanzo* v. *Tillinghast*, 287 U. S. 341, Mr. Justice Roberts said (p. 345):

> The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492.

It is submitted that in view of the consistent administrative interpretation of the procedural requirements of the statute in connection with amendments and the congressional acquiescence in that interpretation, this Court should not invalidate the amendments by adopting an interpretation of Section 8c (17) not required by its language.

2. *The Act does not require that there be a determination and proclamation as to the base period in connection with amendments to orders*

Petitioners' construction of the statute cannot be supported on the language of Section 8e. By its terms that section provides that if, in connection with the issuance of any marketing agreement or order, the Secretary makes the proclamation authorized thereby, the base period fixed by such proclamation *shall be* the base period applicable to *that marketing agreement or order*. In the absence of further statutory directions, if the Secretary proclaimed a base period, the mandate of Congress would require that the base period selected under Section 8e should thereafter be applicable to the order regardless of how many times it was amended. It would necessarily follow that all amendments made pursuant to Section 8c (1), which authorizes the Secretary to issue and, from time to time, to amend orders, would perforce have to be based on the base period applicable to the order. In that case the Secretary would have substantially less discretion with respect to the amendment of orders than he had with respect to their issuance. It was to obviate this difficulty that Section 8c (17) was inserted in the Act. That section provides in part—

> The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided * * *.

Despite the plain import of the language of Section 8c (17) the petitioners refused to regard it as merely conferring upon the Secretary, in connection with the issuance of amendments, the same discretion which he possesses in connection with the issuance of orders. They assert, on the contrary, that the section in effect imposes an additional limitation upon the Secretary, and that it requires him to issue a new proclamation pursuant to Section 8e in connection with any amendment if the order as amended is based on any period other than August 1909 to July 1914 which is prescribed in Section 2 (1) of the Act. The meaning which the petitioners thus attempt to read into Section 8c (17) is not expressly required by the language of that section, is inconsistent with the plan of the statute, and is contrary to the intent of Congress.

In the original Agricultural Adjustment Act of 1933, the base period August 1909 to July 1914 was fixed as a guide for the Secretary of Agriculture in carrying out the authority vested in him to restore the purchasing power of farmers (Act of May 12, 1933; c. 25, Title I, Sec. 2, 48 Stat. 32). No deviation from this standard was permitted regardless of unavailability of satisfactory statistics as to prices of a particular commodity in a particular market for that period. In the amendments of August 24, 1935, Congress attempted to correct the obvious difficulties created

by this inflexible rule. Section 8e was added to the statute vesting in the Secretary discretionary authority, in the absence of satisfactory statistics for the August 1909 to July 1914 base period, to adopt as a base period all or such portion of the period August 1919 to July 1929 for which satisfactory statistics were available (Act of Aug. 24, 1933; c. 641, Sec. 8e, 49 Stat. 762). This section must be regarded as designed to confer additional discretion upon the Secretary and not to limit or confine discretion already conferred upon him.

The terms of Section 8e, however, permitted the powers therein granted to be exercised only in connection with the making of a marketing agreement or the issuance of an order. Strictly interpreted, this language would prevent the Secretary from exercising the powers granted by Section 8e if he were issuing *an amendment* to an order and not an entirely *new order*. If, for example, the statistics for the base period used pursuant to either Section 2 (1) or Section 8e in issuing an order subsequently proved to be unsatisfactory and the Secretary desired to adopt a different base period, it would be impossible to take this step by amending the order. To achieve this result it would be necessary to terminate the order and to issue a completely new order.

Congress endeavored to avoid this result by negativing the possibility of Section 8e's being interpreted as leaving a gap in the additional authority granted to the Secretary. This was done by pro-

viding in Section 8c (17) that the discretion conferred by Section 8e could be exercised in connection with amendments to orders, as well as orders. The logical purpose of this provision is to *permit* the Secretary, in connection with such amendments, to exercise his discretionary power under Section 8e to change the base period originally used in connection with an order.

Petitioners err in assuming that Section 8e is a limitation on the power of the Secretary to issue orders and that by Section 8c (17) the limitation is made applicable to the Secretary's power to amend such orders. When the sections are read as a part of the entire scheme embodied in the Act, it is clear that *the purpose of each of these sections is to vest additional discretionary authority in the Secretary* and not to limit his powers. Section 8e permits the Secretary, in connection with the issuance of an order, to modify the inflexible base period fixed by Section 2 (1). Without more, the Secretary, by acting or not acting under provisions of this section at the time of issuing an order, would exhaust the authority to modify the base period insofar as the particular order is concerned and the base period so determined would be mandatory as to all amendments. However, by Section 8c (17), the Secretary is given the further *discretion* to invoke Section 8e in connection with the issuance of an amendment and thus to change, when the circumstances warrant, the base period which has originally been made applicable to the order.

The petitioners' argument assumes that Section 8e, which was concededly inserted in the Act to extend the Secretary's discretion, is referred to in Section 8c (17) solely for the purpose of limiting his discretion. This assumption tends to defeat the very purpose for which Section 8e was added to the Act. The petitioners' argument also rests upon the premise that a determination made pursuant to Section 8e is valid only for an order as originally issued, and that once the order has been amended the prior determination has no application, at least if the amendment affects in any way the prices fixed in the order. This contention disregards the fact that the statute plainly contemplates that there shall be a difference between orders and amendments to orders; and that the Secretary is intended to have the power to amend orders without holding hearings or making determinations with respect to those provisions of an order which he does not intend to amend. Unless this clear-cut statutory distinction between orders and amendments to orders is to be abandoned, the statute must be construed as permitting the Secretary to amend an order without a new determination as to the base period, so long as the amendment does not involve any change or modification of the base period itself.

The construction which we urge is clearly consonant with the grant of authority contained in Section 8e. That section contemplates the exercise of an informed administrative judgment on a question that is hardly susceptible to review (see *infra*

pp. 99–100). It is not to be supposed that Congress intended by Section 8c (17) to make the provisions of Section 8e a part of a ritual which the Secretary was required to perform regardless of the fact that no useful purpose would be served by doing so. The petitioners attempt to avoid this conclusion by suggesting that Congress may have intended to require a new determination whenever an amendment to an order was issued, to insure that the Secretary would periodically reexamine the available statistics in the Department of Agriculture. If Congress had intended to require any such periodic reexamination, it doubtless would have done so in clear and unequivocal language. Furthermore, there is no warrant in the statute for the suggestion that Congress believed any such direction to be necessary. It is more reasonable to believe that Congress acted upon the assumption that the Secretary would conscientiously discharge his duties; that he would constantly be aware of the changes and improvements in the statistics collected by his Department; and that when developments or changes in those statistics required or permitted a change in the base period, the Secretary, irrespective of other considerations, would make a new determination.[41]

[41] Petitioners suggest that between the promulgation of Order No. 4 and its amendment, certain statistics with respect to the pre-war prices of milk became available to the Secretary; that these statistics were an improvement upon the statistics available when the Secretary promulgated Order No. 4; and that therefore he should have reexam-

It is not unlikely that the Secretary might find it necessary to amend several times in a single year the prices fixed in an order and the amendments might involve changes of only a few cents. Such amendments might be occasioned, for example, by the necessity for conforming to the other guiding standards fixed in Section 2 (1) or by changes in the purchasing power of the commodity caused by changes in prices of other commodities, or by the necessity for not exceeding the limits fixed in Section 2 (2). If the original order was issued on a base period fixed under Section 8e and petitioners are right in their interpretation of the statute, the Secretary would be required to make a determination and to issue a proclamation prior to the issuance of each amendment regardless of the fact that there was no occasion for, and he had no intention of, changing the base period. To accept this construction of the Act is to transform what was intended to be an exercise of considered administrative judgment into a meaningless formality. Reading Section 8e and Section 8c (17) together as a grant of discretionary power necessary to overcome practical obstacles to the performance of administrative duties, it is apparent that there is no justification for adopting the construction urged by petitioners.

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ined the statistics. This suggestion is not supported by the record. The statistics to which petitioners refer did not become available to the Secretary *subsequent* to the amendment of Order No. 4. *They were the same statistics which were available at the time of the promulgation of the order.* This question is discussed in Appendix A to this brief.

3. *If the statute requires a new determination and proclamation, the Secretary has satisfied the requirement by making the determination and by ratifying and adopting the original proclamation*

If the statute should be interpreted as requiring that there be a determination and proclamation in connection with an amendment which is based on all or part of the period August 1919 to July 1929, the Secretary has, on the facts of this case, satisfied the statutory requirements. The purpose of having a base period for an order is to fulfill the requirement that there must be a standard to guide administrative judgment. Section 8e of the Act provides that, whenever, in connection with the issuance of an order, the Secretary finds it necessary to use a base period other than the period fixed by Section 2 (1), he must make a determination and issue a proclamation. The determination which he is required to make is as to *the availability of satisfactory statistics in the Department of Agriculture.* In making this determination, the Secretary exercises administrative discretion. He must determine, *first,* what statistics are available in his Department and, *second,* which of the available statistics are satisfactory. The authority thus vested in the Secretary is not unlike the authority given to the Director of the Mint to estimate, and to the Secretary of the Treasury to proclaim, the value of foreign coins; or the authority given to the Secretary of the Interior to make determinations as to public lands; or the authority given to the Secre-

tary of the Interior to determine the tribal membership status of Indians; or the authority given to the Comptroller of the Currency to determine the necessity for stock assessments in the case of insolvent banks. In all of these instances, the courts have held that such determinations are exercises of administrative discretion which are final and cannot be reviewed by the courts. *Hadden* v. *Merritt*, 115 U. S. 25; *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; *West* v. *Hitchcock*, 205 U. S. 80; *Adams* v. *Nagle*, 303 U. S. 532. It follows that the Secretary's determinations under Section 8e are exercises of administrative discretion not reviewable by the courts.

In this respect those determinations are radically different from the findings involved in such cases as *Mahler* v. *Eby*, 264 U. S. 32; *Atchison Ry.* v. *United States*, 295 U. S. 193, 202; *United States* v. *Chicago, M., St. P. & P. Ry.*, 294 U. S. 499; *Florida* v. *United States*, 282 U. S. 194, which are cited in petitioners' briefs. In those cases the administrative finding was required as a condition precedent to administrative action, and the finding itself and the evidence upon which it rested, could be reviewed by the courts. In relying upon these decisions petitioners have ignored the distinction between an executive determination which does nothing more than disclose the basis upon which action is taken and a formal administrative finding required to be made after a hearing and upon the basis of evidence.

The only apparent reason for requiring the Secretary to issue a proclamation is to assure that a court which is called upon to review the order will know what base period the Secretary has found it necessary to use as a standard on which to base his administrative action. Petitioners concede that the Secretary made the determination and, in connection therewith, issued the proclamation prior to the promulgation of original Order No. 4. They insist, however, that this original determination and proclamation cannot be carried over to the amendments. We concede that if the statute is to be interpreted as petitioners insist it must be, it is then encumbent on the Secretary to make the determination again. However, if the determination is again made, we submit that the requirement of a proclamation may be satisfied in any manner sufficient to inform the courts as to what determination the Secretary has made. For example, the Secretary might issue a new statement or proclamation, or he might breathe new life into his original proclamation by ratifying and adopting it. *That the Secretary did enough to make known to everyone that he was using the period August 1919 to July 1929 in connection with the amendments is unquestioned.* Petitioners argue that this is true; the Secretary's findings in connection with the amendment clearly demonstrate the fact; and we agree. It would seem that this alone would satisfy the requirement of a proclamation unless some particular verbalistic magic must be used.

Petitioners will no doubt insist that the mere making known of the fact that a particular base period is being used in connection with the amendments does not satisfy the statutory requirement that the Secretary must proclaim or announce that he has gone through certain mental processes in deciding to adopt the base period. This contention can be supported only on one of two theories—(1) That the Secretary did not go through the mental processes which are a prerequisite to arriving at the result or, (2) That there are words of art by which the Secretary must give objective evidence of his subjective processes.

If petitioners urge that subjectively the Secretary did not actually make the determination provided for in Section 8e, there is no basis whatsoever for their argument. Petitioners have neither alleged nor attempted to prove that the Secretary failed to exercise his deliberate administrative judgment in the manner set forth in Section 8e. For the reasons hereinafter stated we submit that the facts demonstrate that the Secretary properly made the determination and proclaimed the fact. But for present purposes that is beside the point because, in the absence of unequivocal proof to the contrary, it must be presumed that the Secretary performed the duty laid upon him by the statute. *Bank of United States* v. *Dandridge*, 12 Wheat. 69–70; *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 64; *Pacific States Co.* v. *White*,

296 U. S. 176. As stated in *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 14–15:

> And it is insisted that the orders were induced by misrepresentation and were made without knowledge of the material facts. * * * The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. * * * Under that presumption, it will be taken that Mr. Polk acted upon knowledge of the material facts.

If, on the other hand, petitioners base their objection on the lack of a proclamation, their contention, in the last analysis, is that there are words of art which the Secretary must use. Assuming that to be the case, we submit that the Secretary did use such language—not by issuing a new proclamation, but by ratifying and affirming his first proclamation. There can be no question but that the original proclamation contains all of the necessary phraseology in such clear and unequivocal terms as to satisfy the rule in *United States* v. *Chicago, M. & St. P. & P. Ry.*, 294 U. S. 499, and the other cases cited in petitioner Hood's brief (R. Vol. II, 6–7). It is hardly conceivable that petitioners will contend that the Secretary was not entitled to satisfy the requirement of a proclamation in connection with the amendments by ratifying and affirming the original

proclamation. As is plainly indicated by the decisions of this Court, no words of art and no rigid form is required to accomplish a ratification. Cf. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139. It is enough that there be a sufficient indication of the intent to ratify. In this case the intention to ratify and affirm is plain on the face of the findings made by the Secretary in connection with the amendments (R. Vol. II, 46–49). When the Secretary promulgated the amendments to Order No. 4 he made the following finding (R. Vol. II, 48):

> *Whereas,* the Secretary finds upon the evidence introduced at the hearing upon such proposed amendment, said findings being in addition to the findings made upon the evidence introduced at the hearing on said order, said original findings being herewith ratified and affirmed by the Secretary save only as such findings are in conflict with the findings hereinafter set forth:

It would seem that the foregoing statement evidences a clear intention on the part of the Secretary to ratify all findings made in connection with the original order, including the proclamation as to the base period. However, petitioners point to the fact that the Secretary's language, strictly interpreted, refers to findings made upon evidence introduced at the hearing on the original order. From this they conclude that the proclama-

tion cannot be referred to because it was not made upon evidence introduced at the original hearing. But this conclusion rests entirely upon conjecture. All of the statistics available in the Department of Agriculture relative to the purchasing power of milk in the Boston market for both the August 1909 to July 1914 and the August 1919 to July 1929 base periods were put in evidence at the original hearing on December 10, 11, and 12, 1935, and further evidence in regard to the base period prices was received at the hearings.[11] The procla-

[11] At the hearings held in connection with the promulgation of original Order No. 4, Mr. Paul Miller, an economist of the Department of Agriculture, appeared and offered in evidence a treatise containing economic material with respect to the Boston milk market which had been collected and prepared by the Dairy Section of the Agricultural Adjustment Administration of the Department of Agriculture (Appendix A to Master's report, pp. 7-20, Exhibit 2; R. Vol. II, 6). In describing a part of this document, Mr. Miller said, "Now let me present briefly what data we have on the parity price situation" (Appendix A to Master's report, pp. 8-9; R. Vol. II, 6). Later in the hearings, Mr. Miller introduced supplementary tables containing more complete information and stated that these represented "such information as we have been able to gather on prices paid by farmers by months in a period of years that begins in some cases with 1909" (Exhibit A to Master's report, pp. 20-21; R. Vol. II, 6).

In the material presented by Mr. Miller were tables running from 1909 to 1935 showing by months the average price received by farmers for all milk sold in each of the States Maine, New Hampshire, Vermont, and Massachusetts. These tables are printed as Appendix A to this brief.

It will be noted that these price series are the same as those printed in the Record and referred to in petitioners'

mation as to the base period was not made until January 25, 1936 (R. Vol. II, 6). Consequently it may be fairly said that all of the facts necessary for making the proclamation were put in evidence more than a month prior to the time that the proclamation was made. The conclusion that evidence received at the hearings was the basis on which the findings as to the base period were made is strengthened by the fact that in every other instance in which it has been necessary to issue a proclamation in connection with the issuance of an order the Secretary has not issued the proclama-

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brief (R. Vol. III, 206–209). The material which Mr. Miller presented contained various other tabulations of prices, including a table showing the Class I price from 1919 to 1935 and a table showing the Class II price from 1921 to 1935 (Appendix A to Master's report, Exhibit 7, Exhibit 2, pp. 36, 39, 40, 45; R. Vol. II, 6). It also contained a table of index numbers necessary for computing parity prices (Appendix A to Master's report, Exhibit 2, p. 11; R. Vol. II, 6).

In addition to the material introduced by Mr. Miller on behalf of the Department of Agriculture, one of the witnesses, appearing as a representative of producer organizations, introduced price statistics (Appendix A to Master's report, Exhibit 33; R. Vol. II, 6). This witness also testified at some length as to what base period the Secretary should adopt in connection with the proposed order and testified that a higher price than that ultimately adopted by the Secretary was justified on the basis of prices prevailing during the August 1909 to July 1914 period (Appendix A to Master's report, pp. 39–46; R. Vol. II, 6). Obviously the evidence was given and received on the assumption that the Secretary would make the determination as to the base period on the basis of "evidence introduced at the hearing."

tion until after the hearings on the proposed order. (See fn. 39, p. 188, *supra*.)

Regardless of whether the finding or the ratification quoted above refers literally to the original base period proclamation, it certainly was intended to cover that proclamation. The court below, taking this view of the question, held as follows (R. Vol. I, 123):

> I think that the construction urged by the defendants is too narrow and technical. When the Secretary promulgated amended Order No. 4, he ratified and affirmed the original "findings made upon the evidence introduced at the hearings on said Order."
>
> Plainly, he intended to ratify every finding that had been made in promulgating his original Order save only as they might conflict with the findings of the amended Order. (See paragraph 15 of the master's report.) A fair reading of the amended Order would warrant the conclusion that he affirmed and ratified his finding as to the unavailability of statistics for the pre-war period. This is sufficient compliance with Section 8e of the Act.

As pointed out above, there is no technical requirement as to the manner in which this action must be accomplished. It is enough that the Secretary intended his original finding to stand. We submit that the Secretary satisfied every requirement of the statute.

B. THERE IS NO MERIT IN PETITIONERS' ATTACK UPON THE DETERMINATIONS MADE BY THE SECRETARY AND APPROVED BY THE PRESIDENT UNDER SECTION 8C (9) OF THE ACT

The original order and amendments thereto were put into effect under the provisions of Section 8c (9) which govern the effective date of orders issued without a marketing agreement. That section provides that such orders "shall become effective in the event that * * * the Secretary of Agriculture, with the approval of the President, determines" (1) that the refusal or failure of handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act; (2) that the issuance of the order is the only practical means of advancing the interests of producers pursuant to the declared policy of the Act; and (3) that the issuance of the order is approved or favored either (a) by two-thirds of the producers who, during a representative period, were engaged in the production of the commodity for sale in the marketing area; or (b) by producers who, during a representative period, produce two-thirds of the volume of such commodity sold in the marketing area.

In connection with the issuance of the original order and again in connection with the amendments to the order, the Secretary, with the written approval of the President, found and proclaimed (1) that the refusal or failure of the handlers to sign a marketing agreement did tend to prevent the

effectuation of the declared policy of the Act; (2) that the issuance of the order was the only practical means of advancing the interests of producers in accordance with that declared policy; and (3) that the issuance of the order was approved by more than two-thirds of the producers who, during a representative period, had engaged in production of the commodity for sale in the marketing area (R. Vol. II, 7–9, 44–45).

Petitioners do not question the power of Congress thus to delegate to the Secretary of Agriculture and to the President the authority to determine the effective date of the order. It is not contended that the Secretary failed to make the required determination in proper form; nor that the President failed to approve the determination; nor that the determination was contrary to fact. No question is raised in regard to the Secretary's determination that the refusal or failure of handlers to sign the marketing agreement tended to prevent the effectuation of the declared policy of the Act. No question is raised as to the determination that the issuance of the order was the only practical means of effectuating the declared policy. The only issue which appellants raise is in regard to the Secretary's determination that the issuance of the order was approved by the requisite percentage of producers engaged in producing the commodity for sale in the marketing area during the representative period. Petitioners have neither alleged nor attempted to prove that the order was not approved

by the requisite number. They rely entirely on certain objections to the manner in which the Secretary obtained the information upon which he based his determination.

1. The determination made under Section 8c (9) and approved pursuant thereto by the President is not subject to judicial review

The determination that the refusal or failure of handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act, and the determination that the issuance of the order is the only practical means of advancing the interests of producers in accordance with that declared policy necessarily require the exercise of discretionary judgment which is essentially legislative in character and not properly subject to judicial review. *Williamsport Wire Rope Company* v. *United States,* 277 U. S. 551; *Pacific States Company* v. *White,* 296 U. S. 176; and the dissenting opinion of Mr. Justice Cardozo in *Panama Refining Company* v. *Ryan,* 293 U. S. 388, 448.

Certainly Congress need not have required that any other facts be determined as a condition pursuant to making an order effective. However, Congress did require, as a third condition, that the Secretary should determine that the issuance of the order was approved by at least two-thirds of the producers who, during a representative period, had produced the commodity for sale in the marketing area. It is difficult to perceive any reason why this

determination—merely because it appears to be made in regard to a more definitely ascertainable fact—should be more susceptible to judicial review than the other determinations with which it is coupled. This view is supported by the fact that this last determination is combined in a single subsection of the statute with the determination that the issuance of the order is the only practical means of advancing the interests of producers pursuant to the declared policy of the Act.

Section 8c (9) indicates on its face that Congress did not intend that any of the determinations made thereunder should be subject to judicial review. No notice or hearing is provided, and the determinations are not required to be made upon evidence. Furthermore, in this single instance Congress required that the determination of the Secretary be approved by the President. If the courts should presume to review the determination of the Secretary after it has been approved by the President, then Congress has required the President to perform a futile act. The obvious purpose of requiring such approval is to supply the safeguard which might otherwise have been supplied by authorizing judicial review. We submit that the approval of the President suffices to obviate the necessity for judicial review. As stated in the dissenting opinion of Mr. Justice Cardozo in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 447:

The President, when acting in the exercise of a delegated power, is not a quasi-judicial officer, whose rulings are subject to review upon certiorari or appeal (*Chicago Junction Case,* 264 U. S. 258, 265; cf. *Givens* v. *Zerbst,* 255 U. S. 11, 20), or an administrative agency supervised in the same way. Officers and bodies such as those may be required by reviewing courts to express their decision in formal and explicit findings to the end that review may be intelligent. *Florida* v. *United States,* 282 U. S. 194, 215; *Beaumont, Sour Lake & Western Ry. Co.* v. *United States,* 282 U. S. 74, 86; *United States* v. *Baltimore & Ohio R. Co., post,* p. 454. Cf. *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.,* 289 U. S. 67. Such is not the position or duty of the President. He is the Chief Executive of the nation, exercising a power committed to him by Congress, and subject, in respect of the formal qualities of his acts, to the restrictions, if any, accompanying the grant, but not to any others. One will not find such restrictions either in the statute itself or in the Constitution back of it. The Constitution of the United States is not a code of civil practice.

To say that the express approval by the President of the United States is to be treated as an irrelevant gesture which lends no sanctity to a discretionary exercise of administrative judgment, is to attribute to Congress the intention of burdening the President with meaningless and trivial duties.

Neither the statute nor the Constitution requires this result. We submit that determination of the Secretary as approved by the President is not open to judicial review.

Petitioners will no doubt insist that the determination as to producer approval should be treated differently from the other determinations made pursuant to Section 8c (9) because the Act provides a method by which the facts underlying the determination may be found. This method is set forth in Section 8c (19) which provides:

> For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, *the Secretary may conduct a referendum* among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12). [Italics supplied.]

The above section is not a limitation upon the powers and duties of the Secretary. It is a grant of authority, permissive in character, which allows the Secretary to use a particular method in gathering information on which to base his adminis-

trative judgment. If there is to be any review of this information by the courts, that review should be for the sole purpose of determining whether the information thus collected furnishes a *rational basis* for the Secretary's determination. *Rochester Telephone Corp.* v. *United States,* No. 481, decided April 17, 1939.

2. The referendum was conducted in accordance with the provisions of the act

The Act does not prescribe the procedure for conducting a referendum. The only references in the statute which in any way indicate the procedure to be followed are to the following facts: (1) That the referendum is to be conducted among producers; (2) That the approval of two-thirds of the producers participating in the referendum shall be considered as satisfying the requirements as to approval; and (3) That cooperative associations shall be permitted to express the approval of their members. The details as to the manner in which the referendum may be conducted are left to the discretion of the Secretary. Any regulations prescribed by the Secretary pursuant to this authority is not open to question unless it can be demonstrated that the regulations were "so entirely at odds with fundamental principles * * * as to be the expression of a whim rather than an exercise of judgment." *A. T. & T. Co.* v. *United States,* 299 U. S. 232, 236–237.

Petitioners' entire argument is based upon their disagreement with the Secretary as to what is meant by "a referendum among producers." It is not disputed that the referendum was conducted "among producers" in the literal sense. Petitioners, in seeking to vitiate the referendum, urge upon this Court a different interpretation of the word producer from that adopted by the Secretary. In conducting the referendum, the Secretary considered as producers those persons who, during a representative period (May 1937), delivered milk to a station, "which station, in that month, shipped some part of its products to the marketing area as milk or cream and was approved by one or more of the health authorities in the marketing area" (R. Vol. II, 202). Petitioners insist, in the alternative, that this test either (1) denied a large number of persons the privilege of voting, or (2) permitted a large number of persons to vote who should have been denied that privilege. Since the term "producers" is not defined in the statute, petitioners attempt to find an implied definition based on their conception of the intent of Congress. In order to support their alternative inconsistent arguments, they are compelled to forego reaching any conclusion as to what the intent was and are driven to the position that Congress must have intended a different definition from that adopted by the Secretary.

Unless the definition adopted by the Secretary was so plainly erroneous as to be the arbitrary expression of a capricious whim, petitioners cannot prevail. The facts in this case demonstrate beyond the shadow of a doubt that the definition adopted by the Secretary was not only reasonable, but was the only satisfactory definition which he could have chosen.

Under the Secretary's definition the class of persons who were considered as producers for the purpose of voting on the amendments to the order was the same as the class of persons who, before and after the amendments, were considered as producers eligible to participate in the equalization pool established by the order. The terms and provisions of the order and the amendment affected only those producers. Consequently, the Secretary considered that only those producers were entitled to express an opinion on whether the order should be amended. This would seem to be a most reasonable decision.

The first test contained in the definition required that it be determined whether the producer delivered milk to a receiving station during the representative period. The purpose of this requirement was to determine what persons were actually engaged in producing milk. Petitioners do not quarrel with this part of the definition. The second test required that it be determined whether the plant

to which the producer delivered was approved by the local health authorities and had sold some part of its product in the marketing area during the representative period. The purpose of this requirement was to determine whether the producer was delivering to a plant which was a lawful *source of fluid milk supply for the marketing area* and was actually engaged in shipping some of its product to that market. Petitioners' objections center on this portion of the definition. The reasonableness of this test is discussed elsewhere in this brief. On the basis of that discussion, we submit that the Secretary adopted the only feasible test.

Petitioners insist, *first*, that the Secretary's requirement was too restricted because they construe the Act as requiring the Secretary to open the referendum to every producer whose milk ultimately finds its way to the Boston market in any form. To support this argument they refer to the Master's findings that there were a large number of producers in the south and middle west who delivered to plants which were not approved for the sale of fluid milk in the marketing area but which were supplying cream to the Boston market. As petitioners point out, these producers are located in Illinois, Indiana, Kansas, Michigan, Missouri, Ohio, Tennessee, and Wisconsin (Petitioner Whiting's brief, p. 41). If petitioners had been able to adduce evidence as to the location of producers engaged in producing milk which ultimately reached the Boston market in the form of butter, cheese, skim-milk

powder, candy, etc., they would have been able to argue that the referendum should have been conducted on a nation-wide scale if not an international scale. The short answer to petitioners' argument is that the commodity regulated by the order is *fluid milk available for the Boston market*. Consequently, the Secretary limited the referendum to producers of that commodity.

Anticipating the weakness of their first position, petitioners revert to the argument that the Secretary's definition was too broad and as a result a number of persons voted who were actually ineligible. This argument is premised on the fact that if any part of the product of a plant, which was approved for distribution and sale of fluid milk, shipped to the marketing area, the producers delivering to that plant were considered as eligible to participate in the referendum. From this petitioners conclude that a number of unqualified producers not engaged in producing the commodity for sale in the marketing area were allowed to participate.

First, petitioners insist that if the only product shipped to the marketing area was cream, then the producers were not producing milk for sale in the marketing area. But these producers were delivering milk to plants that were approved for the distribution and sale of fluid milk in the marketing area (R. Vol. II, 202). Obviously, this milk con-

stituted the potential supply of fluid milk for the area. This is shown by the fact that while in May twenty-six of the plants which shipped part of their product to the marketing area shipped only cream; in November and December, the season of short supply, every plant which shipped any part of its product to the marketing area shipped some fluid milk in at least one of the delivery periods (R. Vol. III, 170–171). It would have been grossly unfair to formulate a definition which would exclude producers delivering to plants which were sources of supply when the milk was needed but which happened to have no market for their milk in fluid form during the test period.

Next, petitioners indulge in a series of involved computations designed to illustrate that a number of producers produced milk which never reached the Boston market during the representative period. This argument is based on the fact that some of the plants to which producers participating in the referendum delivered, shipped a relatively small percentage of their product to the marketing area. As pointed out above, the milk at such plants is a potential source of supply. It is impossible to segregate any producer or group of producers delivering to a particular plant and say that the milk or product of the milk delivered by that producer or group of producers did not ultimately reach the marketing area. As found by the Master (R. Vol. II, 97).

> When a farmer delivers his milk to a receiving station qualified to ship fluid milk to the Boston market, neither he nor the handler to whom the milk is delivered knows how much of that particular milk is to be sold as Class I and how much is to be sold as Class II milk nor is the farmer ever informed as to the use which is made of the particular milk which he delivers.

In view of this fact, it was neither unreasonable nor unfair for the Secretary to consider every producer delivering to a plant, approved for the shipment of fluid milk, which shipped any part of its product to the marketing area as a producer of part of that product. Granting, *arguendo,* that this test is not perfect, it is nevertheless the only practical test.

As a final argument, petitioners urge that a number of producers voted who did not possess certificates of registration issued pursuant to Chapter 94, Section 16A to Section 16I of the General Laws of Massachusetts. The previous discussion in this section suffices to show that the referendum was conducted among persons who were engaged in producing the commodity for sale in the marketing area. Plainly, such persons are "producers" within the meaning of the Act. The pertinency of the certificate provisions contained in the Massachusetts statutes to the definition of the term "producer" has been discussed elsewhere in this brief and need not be reiterated. Even if it be assumed that the Massachusetts law is in some way pertinent to the definition of producer in the order, that law cannot be read as restricting the class of persons

upon whom voting privileges are conferred by Congress.

Finally, the primary requirement of the statute in this respect is that the Secretary find that the issuance of the order is favored by the requisite number of producers. There is no requirement the Secretary *must* use a referendum to determine this fact. Section 8c (19) merely provides that the Secretary "may conduct" a referendum for that purpose. If it be assumed that petitioners are correct in asserting that the referendum was void, the question still remains as to whether what the Secretary did furnished an adequate basis for his determinations. Petitioners have not even attempted to prove that if the Secretary had adopted the rules which they advocate, the result would have been different. In the absence of such proof, there is no reason for concluding that the Secretary's determination did not have an adequate basis in fact.

C. THERE IS NO MERIT IN PETITIONER'S ARGUMENT THAT THE ORDER IS NOT AUTHORIZED BY THE STATUTE BECAUSE ITS TERMS AND CONDITIONS HAVE NO SUBSTANTIAL TENDENCY TO EFFECTUATE THE PURPOSES OF THE ACT

1. Petitioner's argument is premised upon an erroneous assumption as to the proper scope of judicial review

The Whiting Milk Company argues that "the terms of Order No. 4 as amended are not authorized by the Agricultural Marketing Agreement Act

of 1937 because they have no substantial tendency to effectuate the purposes of the Act."[42a] This argument is not based on the contention that the terms of the order are not provided for in the Act, but rests entirely on the assertion that the primary finding made by the Secretary pursuant to the mandate of the statute is contrary to fact.

Section 8c (4) of the Act provides:

> After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

Pursuant to this section, the Secretary, in connection with the issuance of the original order, made the finding which is set forth in the order, that the issuance of the order and all of the terms and conditions thereof would tend to effectuate the declared policy of the Act (R. Vol. II, 10, 15). Furthermore, when the Secretary amended the order, he expressly found that the order as amended, and all of its terms and conditions, would tend to effectuate the declared purpose of the Act (R. Vol. II, 46, 49). Petitioner brushes aside

[42a] This issue is not raised by H. P. Hood & Sons, Inc.

these findings made, after notice and hearing and upon evidence by the expert administrative tribunal to whom Congress committed the determination with the statement, "We assume it was based on some sort of testimony introduced at the hearings held by the Secretary." No effort is made to attack the findings on the basis of the evidence before the Secretary. In fact, petitioner's attack is not even based on evidence taken at the trial. Curiously enough, petitioner ignores all of the evidence as to the manner in which the order operated during the five months between its effective date and the commencement of the hearing before the Master. Its whole argument depends upon *a priori* reasoning as to certain results which the petitioner asserts must necessarily follow from the provisions which the order contains. In the last analysis, petitioner is seeking to have this Court substitute its judgment for that of the Secretary.

It is difficult to conceive of a rule that would result in more complete usurpation by the judicial branch of duties committed to an administrative officer. The argument is premised on the theory that this Court should ignore the administrative finding and determine *de novo* whether the order in its operation will effectuate the purposes of the Act. The power to determine that question was lawfully delegated by Congress to the Secretary of Agriculture. The very nature of the question makes it

extremely doubtful if the Court should attempt to review the Secretary's determination. *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551; *Pacific States Co.* v. *White,* 296 U. S. 176; and see dissenting opinion of Mr. Justice Cardozo in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 448.

But if the determination is reviewable at all, it should be reviewed solely for the purposes of determining whether or not there was evidence before the Secretary to support his findings. This Court said, in *Rochester Telephone Corporation* v. *United States,* No. 481, decided April 17, 1939:

> Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 303, *et seq.*

Since petitioners do not challenge the sufficiency of the evidence to support the Secretary's finding that all of the terms and conditions of the order will effectuate the declared policy of the Act, they present no justiciable issue to this Court.

2. The Secretary's finding that all of the terms and conditions of the order would tend to effectuate the purposes of the act is the kind of finding which is not properly the subject of judicial review

By the terms of Section 8c (3) of the Act, the Secretary of Agriculture is authorized whenever he "has reason to believe that the issuance of an order will tend to effectuate the declared policy" of the Act to give "notice of and an opportunity for a hearing upon a proposed order." This section contemplates that a proposal embodying terms which may properly be included in an order shall be offered to interested parties so that they may present their views and place before the Secretary such evidence as may be deemed relevant to the proposal. The hearing thus provided is in the nature of a legislative hearing such as might be held by a committee of Congress in regard to a proposed statutory enactment. The proposal upon which the hearing is held is a proposal for the establishment of a general rule that will govern the future conduct of all persons engaged in a certain industry in a particular locality. In this sense the order differs from orders of a quasi-judicial nature such as Workmen's Compensation Orders (see *Crowell* v. *Benson,* 285 U. S. 22), or administrative orders directed against a single individual (see *Interstate*

Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S. 452). The proposed order on which the hearing is held and the final order may be more aptly described as being of a general quasi-legislative character (*Pacific States Co.* v. *White*, 296 U. S. 176).

Section 8c (4) of the Act provides that the Secretary may issue an order if he finds upon the evidence introduced at the hearing that the issuance of the order and all of the terms and conditions thereof will tend to effectuate the declared policy of the Act. This finding is an expression of the considered judgment of an administrative expert, fully advised by evidence, as to whether the order will carry out the policy fixed by Congress. The finding does not relate to definitely ascertainable existing facts but is an expression of a legislative judgment combining as opinion as to the future with decisions with respect to policy. As was said in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 559:

> The soundness of the judgment exercised by the individual or body to whom the task was confided would depend largely upon the extent both of the knowledge of the special subject possessed and of the experience had in dealing with this particular class of problems. The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof.

Mr. Justice Cardozo, in his dissenting opinion in *Panama Refining Company* v. *Ryan*, 293 U. S. 388, 448, pointed out:

> Discretionary action does not become subject to review because the discretion is legislative rather than executive * * * Investigation resulting in an order directed against a particular person after notice and a hearing is not to be confused with investigation preliminary and incidental to the formulation of a rule.

The order here involved is not unlike the order before this Court in *Pacific States Co.* v. *White*, 296 U. S. 176. In that case, it was contended that a court should review an order of an administrative official issued pursuant to a statute authorizing him to fix standard containers for berries offered for sale in the State of Oregon. Mr. Justice Brandeis, in rendering the unanimous opinion of this Court, said (p. 186):

> It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern.

If orders of this character may be issued by an administrative tribunal without requiring special

findings of fact, *a fortiori* such orders should not be subjected to judicial review to the extent of examining the evidence which supports the conclusions reached by the administrative body.

3. If there is to be judicial review of the Secretary's finding that review should be narrowly limited

The order here involved fixes minimum prices which handlers are required to pay producers for milk. Those minimum prices are fixed under the authority of the statute. If the statute is constitutional, there can be no question of confiscation raised by the order. Cf. *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38. Certainly no one handling milk in interstate commerce has any constitutional right to buy milk at less than the fixed minimum prices. In the absence of any constitutional issue, the Court, in reviewing the finding made by the Secretary in connection with the issuance of the order, is limited to determining whether or not there was evidence before the Secretary to support his finding. *Western Chemical Co.* v. *United States,* 271 U. S. 268; *Virginian Railway Co.* v. *United States,* 272 U. S. 658; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; *Acker* v. *United States,* 298 U. S. 426; *Swayne & Hoyt Ltd.* v. *United States,* 300 U. S. 297; *Rochester Telephone Corp.* v. *United States,* No. 481, October Term 1938, decided April 17, 1939.

4. There is no basis in fact for petitioner's argument

Petitioner's argument is premised on the theory that Congress, in seeking to restore the purchasing power of commodities, intended that the Secretary should construct an order which would tend to adjust the blended or combined price of both classes of milk to the level prescribed in the Act, *i. e.*, the "parity level." This view ignores Section 8c (5) (A) which provides that an order may contain provisions "classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each use classification which all handlers shall pay." Congress by thus authorizing different prices for different classes of the commodity has delegated to the Secretary a price-fixing power in connection with each class which is to be exercised in accordance with the standards contained in Section 2 of the Act. This amounts to recognition by Congress that its ultimate aim may be achieved in this manner even though variations in the ratio between the classes may cause a strict comparison of the combined proceeds in the present period with the combined proceeds in the base period to be inapplicable.

Petitioner does not suggest that the Secretary failed to fix the Class I price of milk in a manner that would tend to restore the purchasing power of

that class of the commodity to the parity level. Petitioner does argue that it is possible to reason from the provisions of the order fixing the Class II price that those provisions have no substantial tendency to restore that price to the level sought. This contention ignores the realities of the economic situation in which the order is designed to operate.

The formula fixed in the order for determining the Class II price has as its two basic factors (1) the price of cream in the Boston market and (2) the price of casein (a skim milk product) as quoted at New York—the casein price furnishing a representative value for skim milk (R. Vol. II, 209–210). These two basic factors account for the entire value of whole milk which is used for manufacturing purposes, *i. e.*, the butterfat and the skim milk.

There is no dispute that both the Boston cream price and the New York casein price are fluctuating prices fixed by open competition of cream and casein derived from milk produced in other parts of the United States (R. Vol. II, 210). In fixing the Class II price on the basis of such competitive prices, the Secretary recognized that, as found by the Master, "the products of Class II milk sold in the Boston market must compete with similar products of milk produced in other parts of the United States and shipped into the Boston market" (R. Vol. II, 97).

The price of Class II milk in the Boston market has in the past depended upon economic factors operating in the entire United States and, to a more limited extent, in the world market (R. Vol. II, 97). For a number of years it has been the custom in the Boston market to fix the price of Class II milk on a formula basis, using as a variable the market price of a manufactured product of milk which would reflect competitive conditions (R. Vol. II, 126–129). The Secretary was required to follow this practice in prescribing a formula for computing the Class II price; an order price substantially higher than the level of the price in the unregulated competitive market, would make it impossible to market the surplus milk which was under regulation.

Petitioner, without mentioning the practical necessity for using such a formula, insists that the formula will not tend to cause the price of Class II milk to approach the parity level. The argument is unsound in theory and is based on an unwarrantedly narrow concept of the Act. As pointed out above, the Master has found that Class II price has always been dependent on economic factors operating in the entire United States, and to some extent in the World market (R. Vol. II, 97). Such factors will obviously cause the Class II price to fluctuate with business conditions and make it extremely unlikely that the ratio between that price and other prices will be disparate. The purpose of

the Secretary in establishing the formula was to assure the maintenance of this relationship and precise uniformity in prices paid by handlers.

Furthermore, the parity standard provided in Section 2 (1) of the Act is not the sole standard by which the Secretary must be guided. Additional restrictions are contained in Section 2 (2) which directs the Secretary to carry out the duty of restoring the purchasing power of commodities "by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of current consumptive demand in domestic and foreign markets." By this provision the Secretary is required to give due weight to the economic factors which influence the price at which milk can be sold for manufacturing purposes. It is apparent that the formula prescribed by the Secretary is in accordance with this direction and will, at the same time, tend to restore the Class II price to the parity level.

The fact that the Secretary has fixed the price of *each class* of milk at a level which tends to cause that price to approach the level that Congress has sought to establish should suffice to satisfy the requirements of the statute. This fact completely destroys the premise from which petitioners' argument proceeds, that is, that Congress established a precise parity level which the *blended price* must attain. But petitioners' argument is subject to

an even more fatal infirmity. It assumes, on the basis of purely *a priori* reasoning, that if such a requirement is imposed, the combined proceeds of the two classes of milk will not approach that level. That assumption is demonstrably contrary to fact.

The order has never been permitted to operate in the manner in which it was intended to operate. The refusal of various handlers, and particularly petitioners, to abide by the order has prevented the blended price from attaining the level which it would have attained under complete compliance. To make a comparison of the prices which have been announced during the period that the order has been only partially effective with the parity price level would be to give petitioners the advantage of their own disobedience of the law. It is possible, however, on the basis of the somewhat imperfect information which is available, to make a reasonably accurate estimate of what the blended price would have been if there had been full compliance with the order during each of the five months between its effective date and the commencement of the hearing before the Master. By comparing this estimated price for each month with the parity price for that month it is possible to test the accuracy of petitioners' conclusions. The following table shows the relationship between the parity price and the estimated blended price

under full compliance with the order for the period August through December 1937: [43]

Month	20th zone average blended price per cwt. plus average dues 1919–1928 by months	Index numbers of prices paid by farmers 1919–1928=100	20th zone blended parity price	20th zone prices—all reports included in computation	Amount prices including all reports below parity	
					Dollars	Percent
Aug.	$2.740	82	$2.247	$2.190	$0.085	3.4
Sept.	2.833	81	2.296	2.196	.100	4.3
Oct.	2.919	81	2.338	2.298	.039	4.2
Nov.	3.003	79	2.443	2.421	.022	.9
Dec.	3.029	79	2.401	2.373	.028	1.2

[43] The monthly average prices for the base period in the first column of the table are the average prices f. o. b. the 181–200 mile zone for each month during the base period. (The prices stated include the average dues paid cooperative organization in that period. (Vol. II, 103–107).) The index number of prices paid by farmers for each month has been converted to the August 1919–July 1929 base period (Vol. III, 162–163). The blended parity price for each month found in the third column was computed by multiplying the average price for each month by the index number for that month.

The prices in the fourth column were computed on the basis of the total amount of milk reported to the Market Administrator as of April 8, 1938, for each period used in the computation (Vol. II, 190–191). *First*, the average price was computed by multiplying the amount of Class I milk reported for each month by the Class I price for the 191–200 mile zone from Boston. This Class I price was $2.6453 and was calculated by subtracting from $3.01, the price fixed in the order for Class I milk received at plants beyond 80 miles, $.3647, the necessary adjustment for freight from that zone (Compare zone prices in price announcements—R. Vol.

The accuracy of the method by which the estimated blended prices were computed may be tested by applying the method to amounts of milk which have been used in computing the price according to the method prescribed in the order and comparing the resulting estimated prices with the prices computed pursuant to the order. Such a test demonstrates that there is a variation of less than one percent between the prices computed by each method.[*] In view of this fact, we submit that the

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III, 101–120). *Second*, the total amount of Class II milk reported for each month was multiplied by the average of the Class II prices announced for each period for milk received at stations beyond 80 miles from Boston (R. Vol. III, 101–120). *Third*, the sum of these two products was divided by the total amount of Class I and Class II milk reported for the month.

The 181–200 mile zone price was selected as the price applicable to the entire market because that zone is about the geographic center of the milk shed (Vol. II, 79). The deduction for cash balance provided in the order was not considered in making these computations because that deduction, if not used, is added back in the following period and, if there were full compliance with the order, would merely result in a revolving fund. It, therefore, could not affect the blended price except for the first period after the order went into effect.

[*] The following table shows for each delivery period between August 1 and December 31, 1937, the price computed pursuant to the provisions of the order and the price which would be obtained for the same amounts of milk by using

foregoing tabulation represents a fair test of the tendency of the order to raise the level of the blended price to that sought to be established by the Act.

It will be noted that in each month the estimated blended price was below the parity level, but at no time was it as much as 5 percent below that level.

Petitioner appears to suggest that this was merely coincidence, but the relationship between the two series of prices is too consistent to be thus lightly dismissed. The fact is that petitioner's

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the method of estimation prescribed in the preceding *footnote*.

	Announced blended price for 191–200 mile zone	Announced price as adjusted for cash balance deduction	Blended price as estimated	Difference
Aug. 1–15	$2.098	$2.138	$2.160	$0.022
16–31	2.126	2.166	2.188	.022
Sept. 1–15	1.907	1.947	1.965	.018
16–30	1.890	1.930	1.942	.012
Oct. 1–15	1.877	1.917	1.931	.014
16–31	2.038	2.042	2.056	.014
Nov. 1–15	2.237	2.232	2.254	.022
16–30	2.291	2.281	2.306	.025
Dec. 1–15	2.272	2.254	2.274	.020
16–31	2.135	2.137	2.160	.023
Average		2.1044	2.1236	.0192

In the first column is the announced blended price for the 191–200 mile zone (Vol. III, 101–129). In the second column is the announced blended price as adjusted by the cash balance addition and deduction actually made in the calculation of the blended price (Vol. III, 101–120). In the third column is the estimated blended price. The fourth column represents the error in the estimate. The average error is less than $0.02 per hundredweight and indicates that the method is over 99 percent accurate.

a priori reasoning and fine-spun theories are not sufficient in weight to overcome this empirical proof that the order will tend to raise the level of the blended price to the level which the petitioner asserts the Act seeks to establish.

D. IN TERMINATING THE SUSPENSION OF THE OPERATION OF ORDER NO. 4, THE SECRETARY COMPLIED WITH THE STATUTORY REQUIREMENTS

The petitioner in *Whiting Milk Company* v. *United States et al.*, No. 809, contends that the Secretary of Agriculture failed to comply with the statutory requirements when he terminated his suspension of the operation of Order No. 4. Inasmuch as certain of petitioner's contentions on this point seem likely to create misapprehensions as to the actions of the Secretary of Agriculture and as to the motives which prompted those actions, it is desirable to restate briefly the procedure which the Secretary followed in connection with the issuance and suspension of Order No. 4.

Order No. 4 was originally issued by the Secretary of Agriculture on February 7, 1936, after full compliance with the procedural requirements laid down in the statute (R. Vol. II, 1–36). On July 23, 1936, the District Court for the District of Massachusetts held in *United States of America et al.* v. *Buttrick et al.*, 15 F. Supp. 655, that the provisions of the Agricultural Adjustment Act, under which Order No. 4 has been issued, had been invalidated by the decision of this Court in *United States* v.

Butler, 297 U. S. 1. Thereupon on August 1, 1936, the Secretary of Agriculture suspended the further operation of the order (R. Vol. II, 36–37). In connection with the suspension of the operation of the order, the Secretary of Agriculture made no finding that the order did not tend to effectuate the declared policy of the statute.

On June 16, 1937, the United States Circuit Court of Appeals for the First Circuit reversed the decision of the District Court in the *Buttrick* case, 91 F. (2d) 66. On June 25, 1937, the Secretary of Agriculture terminated his previous suspension of the operation of the provisions of Order No. 4 (R. Vol. II, 40–41). The termination of the suspension became effective as to a part of the provisions of the order on July 1, 1937, and as to the other provisions of the order on August 1, 1937 (R. Vol. II, 41). Generally speaking, it may be said that the sections of the order, which became effective on July 1, 1937, were the provisions which contained the formal and administrative provisions of the order and not those which imposed positive obligations upon the handlers in the market. In fact, the only provisions becoming effective on July 1, 1937, which imposed any important obligations upon handlers, were the provisions of Article 5 authorizing the Market Administrator to require certain reports. The provisions of the order which were to become effective on August 1, 1937, were the substantive and operative provisions of the order, such as those

with respect to prices, equalization payments, the market administration charge, etc.

In terminating his suspension of the order, the Secretary of Agriculture made no contemporaneous express declaration that the termination of the suspension would effectuate the declared purpose of the Act. It is this omission which the petitioner asserts invalidated all of the action which the Secretary has subsequently taken.

On July 28, 1937, the Secretary of Agriculture issued an order amending all of the provisions of Order No. 4 which were to become effective on August 1, 1937 (R. Vol. II, 46–75). This order was made after full hearings, conducted in compliance with the requirements of the statute, and contained an express finding that all of the terms and conditions of the order as amended would tend to effectuate the declared policy of the Act (R. Vol. II, 43–46, 49).

Despite the express finding made by the Secretary that Order No. 4 as amended and all of its terms and conditions would tend to effectuate the declared purpose of the Act, and despite the fact that this finding was made after full hearings and upon the basis of substantial evidence, petitioner contends that Order No. 4 as amended cannot be enforced because when the Secretary terminated his suspension of Order No. 4, he did not make an express declaration that the termination would effectuate the declared purpose of the Act. The re-

spondents submit that petitioners' argument on this point misconstrues the provisions of the statute and involves serious misconceptions as to the nature of the administrative action which is at issue.

1. *The statute did not require the Secretary, in the circumstances of this case, to make an express declaration that the termination of the suspension would tend to effectuate the declared purpose of the act*

Section 8c (16) (A) of the act provides as follows:

> The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

Existence of the power to terminate a suspension of the operation of an order is a necessary implication of the terms of this Section. In the absence of the power to terminate the suspension, there would be no substantial difference between the power to terminate orders and the power to suspend. Yet, the statute makes a clear distinction between the two powers. Petitioner, in effect, concedes existence of the power to terminate a suspension, but asserts that since the termination of a suspension is a kind of "correlative situation" to

a suspension, the Secretary, when he terminates, must make a finding analagous to the one which he is required to make when he suspends; that is to say, a finding that reinstatement of the order will tend to effectuate the declared purpose of the act. Analysis of the pertinent statutory provisions and consideration of the nature of the administrative action involved lend no support to this construction of the Act. The finding which the Secretary is required to make before he suspends the operation of an order is not required to be made after a hearing or upon evidence. It is the kind of administrative finding which can hardly be subject to judicial review.[45] The finding is doubtless required in the first place as a standard to guide the Secretary's exercise of discretion. Announcement of the finding does nothing more than disclose the basis upon which the Secretary has acted. When the Secretary terminates the suspension of an order, no similar reasons call for the making of an analogous finding. The mere act of termination, considered as a revocation of the Secretary's previous action, sufficiently discloses the basis upon which he has proceeded. Its effect is to reinstate the Secretary's original finding, made when he issued the order in the first instance, that the order will tend to effectuate the declared purpose of the Act.

[45] In this respect it is analogous to the other findings and determinations of the Secretary discussed in this brief.

But even if it is assumed that in most situations the Secretary must make a finding as to effectuation of the purpose of the Act when he terminates a suspension, the situation at bar does not call for the application of that rule. The only reason for requiring the Secretary to make such a finding, in connection with the termination of the suspension, is so that the record of administrative action may clearly disclose that he has revoked his prior finding, made at the time of the suspension, that the order did not tend to effectuate the declared purpose of the Act. *In this case when the Secretary suspended the operation of Order No. 4, he made no finding that the order did not tend to effectuate the purpose of the Act.*[46]

The Secretary having made no prior administrative finding inconsistent with his action in terminating the suspension, no reason existed for his including in the suspension a statement designed to revoke the prior finding.

In any event, in this case it is highly doubtful whether the Secretary when he suspended Order No. 4 and then terminated that suspension pur-

[46] Petitioner admits that this was a defect in the Secretary's prior action in suspending the order, but asserts that it was cured by Section 4 of the Agricultural Marketing Agreement Act of 1937, which ratified and confirmed acts of the Secretary performed in connection with orders issued under the Agricultural Agreement Act. Assuming that this is so, the ratification did not supply the finding which the Secretary had failed to make. Despite the ratification there was no prior administrative finding for him to repudiate or revoke when he terminated the suspension.

ported to exercise the authority conferred upon him by Section 8c (16) (A). It is clear from the terms of that section that the power of terminating and suspending orders which it confers upon the Secretary is to be used when, in his judgment, expressed in a formal finding, the terms of an order will not effectuate the declared purpose of the Act. When the Secretary suspended the operation of Order No. 4 he made no such finding. This omission was deliberate. In fact, the Secretary did not suspend the operation of Order No. 4 because he believed that its terms did not tend to effectuate the purpose of the Act, but because the decision of the District Court in *United States* v. *Buttrick*, 15 F. Supp. 655, made enforcement of the Act impossible. When he terminated the suspension of Order No. 4, he did so not because of any change of opinion with respect to the effect of the provisions of Order No. 4 but because the decision of the Circuit Court of Appeals in the *Buttrick* case had made enforcement possible.

Viewed in this light, the action of the Secretary in suspending the operation of Order No. 4 was not an ordinary exercise of the administrative discretion conferred upon him by Section 16a, but rather an announcement, prompted by the decision of the District Court in the *Buttrick* case that he would no longer attempt to enforce the order. The existence of the power on the part of the Secretary to make such an announcement is certainly a necessary incident of his duties under the Act. He was under no obligation to attempt to

enforce the order so long as the District Court took the view that the statute under which it was issued was unconstitutional and void. Since he was not required to make a futile attempt at enforcement, it was permissible for him to make an announcement to that effect. And in making that announcement it was unnecessary for him to admit that if enforcement were possible, the terms and provisions of the order would not effectuate the declared purpose of the statute.[46a] If the Secretary had the power to make such an announcement, as he clearly must have had, he undoubtedly had the power to revoke it by another announcement cast in the same form.

2. *If the statute required the Secretary to make a finding with respect to the reinstatement of Order No. 4, he complied with the statutory requirement.*

Petitioner insists that if a finding was required, the finding cannot be supplied by implication. The cases upon which petitioner relies to support this contention have no application to the kind of finding here involved.[47] Certain of those decisions relate to findings which are required to be made after hearing and upon evidence introduced at those hearings and which are subject to judicial review, such findings must be in definite and unequivocal form, if

[46a] This admission would be necessary if he purported to act under the provisions of Section 8c (16) (A).

[47] *Wichita R. R. & Light Co.* v. *Public Utilities Commission of Kansas*, 260 U. S. 48; *Mahler* v. *Eby*, 264 U. S. 32; *Atchison, Topeka & S. F. R. R. Co.* v. *United States*, 295 U. S. 193.

the function of judicial review is to be discharged."[45] The decision in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, cited by petitioner, dealt with a situation in which the executive officer had never made any finding or determination to disclose the factual basis for his administrative action. The facts here are different. It can hardly be contended that there was no disclosure of the basis upon which the Secretary was acting. In the order terminating the suspension, the Secretary recited that he had "determined to terminate said order of suspension." (R. Vol. II, 41.) This statement can only mean that it was the Secretary's judgment that reinstatement of the order would tend to effectuate the declared purposes of the Act. Petitioner suggests, however, that certain of the provisions of the order were reinstated for the purpose of being amended and that therefore the Secretary could not have intended to find that those provisions tended to effectuate the declared purpose of the statute. If this view is correct the Secretary could never reinstate suspended provisions with a view to amending them. Such a construction of the statute would be unreasonable. The fact that the Secretary conceived that amendments to certain provisions would be necessary did not prevent him from finding that reinstatement of the provisions, for the purpose of making those amendments, would tend to effectuate the purpose of the Act. That in sub-

[45] See page 100, supra.

stance is the determination which the Secretary made here.

Finally, it should be emphasized that when the Secretary issued the order amending Order No. 4, *he expressly found that all the terms and conditions of the order as amended would tend to effectuate the declared policy of the Act* (R. Vol. II, 49). This finding related not only to the amendments to the order but to all of the provisions of the original order as well which had not been changed by the amendments. If the action of the Secretary in terminating the suspension of Order No. 4 was in any way defective in form, this finding remedied the deficiency.

Petitioner's answer that this finding relates to what was essentially a new order and not to the original order which the Secretary reinstated ignores the realities of the situation. The Secretary's finding was made prior to the date upon which the more important provisions of the original order were to become effective under the Secretary's order of reinstatement; the relationship between the finding and the reinstatement is too obvious for denial. It is apparent that when the Secretary issued the amendments to Order No. 4, and made the finding with respect to the effect of the order as amended, he intended the finding to apply to the reinstatement as well as to the amendment. The form of his action may be open to criticism, but in substance it fully complied with the statutory requirements. The petitioner's criticism of the Sec-

retary's procedure is highly technical in character. No suggestion can properly be made that the form of words which the Secretary used when he terminated the suspension, jeopardized petitioner's right in any way. Those rights were fully safeguarded by the hearings and the other procedural steps which the Secretary took before he issued the amendments.

E. THE MARKET ADMINISTRATOR HAS COMPLIED WITH THE PROVISIONS OF THE AMENDED ORDER

Petitioners contend that in each of the delivery periods between August 1, 1937, and December 31, 1937, the Market Administrator, in computing the blended price, improperly included milk of persons who were not producers within the definition contained in the order. That definition follows (Article I, Section 1, R. Vol. II, 59, 60):

> "Producer" means any person who, in conformity with the health regulations which are applicable to milk which is sold for consumption as milk in the Marketing Area, produces milk and distributes, or delivers to a handler, milk of his own production.

The Master found that in each of the delivery periods between August 1, 1937, and December 31, 1937, some of the milk reported to the Market Administrator was delivered by producers who did not possess a certificate of registration as provided in Section 16A to Section 16I of Chapter 94 of the General Laws of the Commonwealth of Massachu-

setts, and that some of the milk so reported was, in fact, included in the computation of the blended price in each of the delivery periods (R. Vol. II, 177). Petitioners assert that the inclusion of this milk was an illegal deviation from the terms of the order.

Petitioners' contention, if correct, does not affect the validity of the Act or of the order, nor does it afford a basis for denying respondents the relief which they sought below. At the most, it calls for modification of the decree below and not for its reversal. Even if the necessity for correction of the alleged error is granted, the legal obligation of petitioners to obey the Act and the order remains unimpaired.

At the outset of the argument it should be pointed out that petitioners have failed to show that the asserted error inflicted any injury upon them. The Master found that if the Market Administrator had excluded the milk received by handlers from producers who did not possess certificates of registration,

> * * * the effect of the exclusion of a part of that milk would have been to raise the blended price for the particular delivery period in which it had been included and the effect of the exclusion of another part of that milk would have been to lower the blended price for the particular delivery period in which the said milk had been included [R. Vol. II, 177].

Petitioners attempt to construe this as a finding that the alleged error raised the blended price in some delivery periods and lowered it in others. This is patently an erroneous construction of the finding. The Master did not attempt to do more than to find that in any particular delivery period exclusion of a part of the milk would have tended to raise the price for that period and exclusion of another part of the milk would have tended to lower the blended price for that same period. He made no finding as to the ultimate effect which these opposite tendencies would have upon the blended price in any delivery period nor did he find that the inclusion of this milk increased the equalization payments required of petitioners, or otherwise affected or injured them in any way. The Master could not properly have made any finding as to an increase or decrease in the blended price because there was no evidence before him as to the total number of producers whose milk was asserted to have been improperly included, or as to whether their milk was included in the computation as Class I or Class II milk. Evidence as to the latter fact is vital because the effect of the inclusion of milk in the computation depends entirely upon whether it is included as Class I or Class II (R. Vol. II, 193–194).

It follows from the nature of the Master's finding that the record is barren of evidence that the asserted error injured petitioners. Evidence that the asserted error "affected" the blended price is

not enough. There must be proof that the effect injured petitioners; in the absence of proof of injury petitioners have no legal standing to attack the alleged error. *Cusack Co.* v. *City of Chicago*, 242 U. S. 526; *Tyler* v. *Judges of Court of Registration*, 179 U. S. 405; *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

But even if it is assumed that petitioners are entitled to raise the point, their attack on the Market Administrator's action is without merit. The District Court found that the conduct of the Administrator was "a practical and satisfactory compliance with the order" (R. Vol. I, 124). The record fully supports this conclusion. Indeed, the Secretary of Agriculture and the Market Administrator followed the only conceivable course open to them; had they adopted the policy insisted upon by petitioners, administration of the order would have been impossible.

At the outset, it is important to note that no contention is made that the Market Administrator included in his computations any milk which was produced or handled in unhealthy or unsanitary conditions or any milk which was in any way impure or deleterious. That contention would find no support in the record. All the milk included in the computation of the blended price was delivered to dealers who were licensed to sell fluid milk in the marketing area and at least a part of the milk which was delivered by producers with-

out certificates was sold in the marketing area (R. Vol. II, 177). In the absence of evidence to the contrary, it cannot be assumed that the health officers of the Commonwealth of Massachusetts and of the cities and towns in the marketing area would permit milk to be delivered to licensed dealers or sold in the marketing area which, in fact, was produced in unhealthy or unsanitary conditions or which was impure or deleterious.

The Market Administrator acted on the assumption that local health authorities were diligently performing their duties and that if they permitted milk to be delivered to licensed handlers and sold in the marketing area, that milk properly could be regarded as having been produced in conformity with the applicable health regulations.

The issue raised by petitioners' contention hinges on the test which the Market Administrator should have applied to determine whether a farmer was a producer within the meaning of Order No. 4 as amended. The test which the Secretary of Agriculture and the Market Administrator in fact applied was whether the farmer delivered milk to a plant licensed by one or more of the towns or cities in the marketing area for the sale and distribution of fluid milk (R. Vol. II, 174). All of the handlers reporting milk which was included in the computation of the blended price for each delivery period between August 1, 1937, and December 31, 1937, were in fact licensed to sell fluid milk by one or

more of the cities or towns in the marketing area (R. Vol. II, 174–176, Exhibits 12–12E).[49]

Petitioners, on the other hand, insist that the only test which the Market Administrator could properly apply to determine whether a farmer was a producer within the meaning of the order was the possession by the farmer of a certificate of registration, issued pursuant to Section 16A to Section 16C of Chapter 94 of the General Laws of Massachusetts. Section 16A provides:

> Except as provided in section sixteen H, no person shall sell or offer or expose for sale milk produced on a dairy farm, for use or disposal elsewhere than on such farm, unless as to such farm a certificate of registration has been issued by the director under section sixteen C and is in full force and effect; provided, that one who purchases such milk from a dealer registered under section sixteen F and sells or offers or exposes the same for sale shall not be deemed to have

[49] The parties do not agree as to the legal significance to be attached to the licenses, but there is no dispute that the handlers were licensed. The licenses are not printed in the record; they were annexed to the Master's report as Exhibits 12–12E and have been certified to this court as original exhibits (R. Vol. II, 175). The Market Administrator excluded three plants of New England Dairies, Inc., in certain delivery periods in the mistaken belief that they were not approved for the shipment of fluid milk by any local health authority in the marketing area (R. Vol. II, 174). In the court below the respondents conceded that this was error and that the error should be corrected when the blended prices are recomputed. (See Plaintiffs' Proposed Findings of Fact, R. Vol. I, 84–85.)

violated this section unless he knows or has reasonable ground to know that the same was not produced on a farm as to which such a certificate has been issued.[36]

Section 16C of Chapter 94 provides in part:

> The director may issue, and may from time to time renew, certificates of registration for dairy farms. No certificate of registration for a dairy farm shall be issued or renewed by the director, except as hereinafter provided, until he has made or caused to be made at least one inspection of said farm within one year prior thereto, and unless said inspection clearly indicates a satisfactory compliance with the uniform minimum requirements for dairy farm inspection established under section forty-two of chapter six. The director shall accept the inspection reports of milk inspectors and agents of local boards of health within the commonwealth in respect to dairy farms located within or without the commonwealth which have been inspected by them, and, if such reports state that such dairy farms have complied with said minimum requirements, certificates of registration shall thereupon issue. * * *

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[36] Section 16H authorizes the Milk Regulation Board of the Commonwealth, under certain conditions, to designate certain additional areas as qualified areas, and further provides that dairy farms located in such areas shall be entitled to certificates of registration without additional inspection. The Board has never exercised the powers vested in it by this section (R. Vol. II, 178).

Section 42 of Chapter 6 referred to in Section 16C establishes a Milk Regulation Board and authorizes it to promulgate rules and regulations, including uniform minimum requirements, for the inspection of dairy farms producing milk for distribution, sale, or exchange in the Commonwealth.[51]

Strictly speaking, the applicable health regulations which control the production of milk are the regulations promulgated by the Milk Control Board and by the local health authorities with respect to the conditions under which milk is to be produced, and not the provisions of Sections 16A to 16 I.[52] The latter sections are merely a part of the statutory machinery provided to enforce the health regulations which actually prescribe the conditions under which milk is to be produced and handled; they are procedural and not substantive in character. The "regulations" to which the order refers in defining a producer as one "who, in conformity with the health regulations which are ap-

[51] The members of the Milk Regulation Board are the Commissioner of Agriculture, the Commissioner of Public Health, and the Attorney General.

[52] The Master found (R. Vol. II, 89):

> The production and distribution of milk are subject to special sanitary regulations imposed by the New England States and by the local subdivisions thereof. (See General Laws of the Commonwealth of Massachusetts, Chapter 94.) So far as these regulations apply to the production of milk they relate to the cleanliness and ventilation of stables and milk houses; the proper equipment for cooling milk and its use; the health, physical well-being, and cleanliness of cows; and a number of other circumstances

plicable to milk which is sold for consumption as milk in the marketing area, produces milk" are the regulations which prescribe the sanitary conditions in which milk shall be produced and handled.

In their brief petitioners tacitly admit the propriety of this view of the purpose of the definition. They point out that compliance with health regulations increases the cost of producing and handling milk and suggest that the purpose of the definition in the order was to protect farmers who incurred this higher cost from the competition of milk produced at a lower cost in disregard of the health regulations. Assuming this to be true, it follows that the health regulations with which the order was primarily concerned are those which relate to such matters as the cleanliness and ventilation of stables and milk houses, the proper equipment for cooling milk and its use, and the health, physical well-being and cleanliness of cows, etc., because it is those regulations which increase the cost of production. A farmer who produces and handles milk in compliance with those regulations is a producer within the meaning of the order, even though he may not posess a certificate issued in accordance with the provisions of Section 16C. It may well be that possession of such a certificate can properly be regarded as conclusive proof that the possessor has complied with the applicable health regulations. It may also be true that a farmer who does not possess such a certificate and who sells milk, or offers

it for sale within the Commonwealth of Massachusetts, is guilty of an offense under the laws of the Commonwealth regardless of whether his milk has been produced in strict conformity with the health regulations.[53] But for the purposes of Order No. 4, as amended, the possession of such a certificate is not the exclusive test of compliance. *Indeed, in the circumstances of this case, possession of such a certificate is not even a practicable or possible test of compliance.*

The Master found that although there were records in the State House in Boston, Massachusetts, which purported to disclose the name and town in which the farm was located for each producer to whom a certificate, under Section 16A to Section 16I of Chapter 94 of the General Laws, had been issued and the date of expiration thereof, *it was as a practical matter impossible for the Market Administrator to determine from those records and from the information which was available to him, whether or not the producers, whose milk was reported to him by the various handlers who submitted Form 15 reports for the delivery periods August 1, 1937, to December 31, 1937, did in fact hold the certificates of registration provided for in Section 16A to Section 16I of Chapter 94 of the General Laws* (R. Vol. II, 176–177).

[53] If this is true, it is not because the farmer has failed to produce milk in conformity with the applicable health regulations, but because he has neglected to obtain the certificate which the Commonwealth of Massachusetts has provided. shall be the exclusive test of compliance.

Thus the test which petitioners insist the Secretary of Agriculture and the Market Administrator should have applied is one which is incapable of application and one which would have made administration of the order impossible. On this ground alone the Secretary of Agriculture and the Market Administrator were entitled to reject the test for which petitioners now contend in favor of one which was workable. The Secretary of Agriculture is not compelled to place upon his own words an interpretation which requires an impossibility, cf. *Union Pacific Ry. Co.* v. *Hall et al.*, 91 U. S. 343, 347; or *Carroll County* v. *Smith*, 111 U. S. 556, 565; one which would make enforcement impractical or inconvenient, cf. *United States* v. *Tappan*, 11 Wheat. 419, 426; *Bird* v. *United States*, 187 U. S. 118, 124; or one which would lead to an absurd consequence, *United States* v. *Katz*, 271 U. S. 354, 357; *Sorrells* v. *United States*, 287 U. S. 435, 446. Petitioners' construction of the order violates all of these canons of construction; it makes enforcement of the order impossible and not merely impractical and inconvenient; it produces the absurd consequence of construing the provisions of the order as self-destructive.

It is no answer for petitioner to assert that the impossibility here is created by the words of the order and that the Secretary of Agriculture is responsible for those words. A literal reading of the definition of producer in Order No. 4 does not com-

pel acceptance of petitioners' test. The health regulations to which the definition refers are the sanitary regulations with respect to the conditions under which milk is produced and handled, and not the procedural provisions of Massachusetts statutes relating to the possession of certificates. The fact that the definition in Order No. 4 was framed by the Secretary of Agriculture, far from supporting petitioners' contention, is a persuasive reason for its rejection. The Secretary chose the words whose meaning is here in issue. He is the administrative officer charged with the duty of enforcing Order No. 4 as amended. Both considerations give body to the Secretary's rejection of petitioners' interpretation of the definition of "producer" in the order.

The situation calls for the application of the well-established principles with respect to the weight to be attached to administrative interpretation. The courts attach great importance to the interpretation given to acts of Congress by administrative officers charged with their enforcement.[14] Where, as here, the officer is construing his own language and not that of Congress, the force of the rule is far stronger. See *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 325. In such a situation there can be no question of deviation from Congressional command. The only issue is whether the meaning which the administrative officer at-

[14] See the decisions cited on p. 90, *supra*.

taches to his own words shall be rejected in favor of a meaning proposed by someone else. Unless the officer's interpretation is manifestly unfair or unreasonable it should be controlling. Certainly the interpretation adopted here by the Secretary should not be rejected by this Court unless it is so patently repugnant to the entire plan and intent of the order that its adoption would jeopardize the purpose the order was intended to achieve. There is no basis for taking that view of the Secretary's interpretation. On the contrary, it was consistent with the plan and spirit of the order and it was the only interpretation which would permit the purpose of the order to be accomplished.[55]

The test which the Secretary of Agriculture and the Market Administrator actually applied to determine whether a farmer was a producer within the meaning of Order No. 4 was whether the farmer delivered milk to a plant which was

[55] The petitioners realizing that their construction of the order would make enforcement impossible suggest that the Secretary could have changed the definition by amendment. Amendment of the order would, of course, have involved the giving of notice, the holding of hearings, the making of findings, etc. And in the instant case the only issue in these proceedings would have been whether the Secretary and the Market Administrator should attempt something which was impossible. The petitioners' suggestion that this was the only course open to the Secretary assumes that he has no power to construe his own words. A regulatory plan which required the Secretary to hold hearings and take evidence whenever he wished to interpret one of the definitions used in the plan would obviously be cumbersome to the point of being impractical.

licensed and approved by one or more of the towns and cities in the marketing area for the shipment and sale of fluid milk. Licenses for the distribution and sale of fluid milk are issued by the towns and cities in the Commonwealth, pursuant to Section 40 of Chapter 94 of the General Laws which provides in part:

> No person, except a producer selling milk to other than consumers, or selling not more than twenty quarts per day to consumers, shall deliver, exchange, expose for sale or sell or have in his custody or possession with intent so to do any milk, skimmed milk, or cream in any town where an inspector of milk is appointed, without obtaining from such inspector a license which shall contain the number thereof, the name, place of business, residence, number of vehicles used by the licensee, and the name of each driver or other person employed by him in carrying or selling milk. * * *[56]

Because of the terms of the licenses issued to the handlers and the provisions of the local ordinances

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[56] Producers and dealers are also required by the General Laws to obtain a permit from the Board of Health of the town, before selling fluid milk therein or delivering it for sale therein. This requirement is imposed by Section 43 of Chapter 94 of the General Laws, as amended in 1935 and 1936. A permit issued under this section may contain such reasonable conditions as the Board of Health deems suitable for protecting the public health, and may be revoked for failure to comply with any of such conditions. There is no evidence that any of the handlers reporting milk which was included in the computation of the blended price did not possess such a permit.

and regulations under which the licenses are issued the Secretary of Agriculture and the Market Administrator were entitled to treat the possession of the licenses as adequate evidence that the milk which the handlers received from farmers and reported to the Market Administrator was produced in compliance with the applicable health regulations. The local ordinances and regulations under which the licenses were issued required the handlers to handle and sell milk in accordance with the laws of the Commonwealth.[57] The licenses by their terms required the handlers to comply with the laws of the Commonwealth and the regulations of the local health authorities (R. Vol. II, 89).[58]

Under the provisions of Section 16A to Section 16I, it was unlawful for any dealer to sell or offer to sell any milk produced on a farm which did not

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[57] For example, see Section 53 of the regulations of the Board of Health of Somerville; Article VI, Section 1, of the health regulations of the town of Brookline; Rule 96 of the rules and regulations of the city of Chelsea; Chapter XIX, Section 1, of the regulations of the Board of Health of Arlington, Massachusetts. Compare Article I of the Milk, Frozen Desserts and Ice Cream Mix Regulations of the Boston Health Department. (All of these municipal ordinances and regulations were attached to the Master's report as Exhibits 11 to 11–E. They have not been printed in the record but have been certified to this court as original exhibits (R. Vol. II, 175).

[58] See also Exhibits 12–D and 12–E. (Licenses issued by the City of Somerville to Milton Cooperative Dairy Corporation and to New England Dairies, Inc.) These exhibits are not printed in the record but were certified in the court as original exhibits (R. Vol. II, 175).

have a certificate of registration in full force and effect. This was a requirement of the General Laws of the Commonwealth which each handler was required to observe if he was to obtain and keep a license from any local health authority. The Market Administrator was entitled to assume that each handler who had a license from a city or town in the marketing area was complying with the provisions of Section 16A to Section 16I. If the fact was otherwise, no license should have been issued to the handler. As long as the handler continued to possess the license and to sell milk under color of its possession, the Market Administrator was entitled to presume that the handler was in substantial compliance with Section 16A and all of the other applicable provisions of the general laws. If the handler did not comply with these laws the officers of the city or town which had issued the license had the power to cancel or revoke it." The presumption that the local health

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* Petitioners' assertion that the possession of a license had "no tendency at all to establish that the milk distributed from that plant complies with all the applicable health requirements" disregards the fact that the license could not be obtained, nor kept, unless the milk distributed from the plant did comply with all of the applicable health requirements.

Section 41 of the General Laws of the Commonwealth of Massachusetts provides that a license may be revoked at any time for failure to comply with any regulation of the Board of Health of the town.

authorities would act promptly and vigorously to compel compliance was neither foolish nor unreasonable.

Quite apart from the provisions of the General Laws and the regulations issued by the State Milk Control Board, the local ordinances and regulations under which licenses to dealers were issued themselves contained rules with respect to the production and handling of milk. These regulations, like those of the State Milk Control Board, related to the cleanliness and ventilation of milk houses, the proper equipment for cooling milk, the health, physical well being, and cleanliness of cows, and a number of other circumstances (R. Vol. II, 89).* Inasmuch as the licenses issued to handlers were conditioned on continued compliance with these local health regulations, and inasmuch as failure to comply could be punished by revocation of the license, the continued possession of the license and the sale and distribution of milk thereunder could likewise properly be regarded as evidence of compliance with the health regulations which controlled the production and handling of milk.

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*See the municipal ordinances and regulations attached to the Master's report as Exhibits II and II-E and certified to this court as original exhibits (R. Vol. III, 175); for example, Article I, Sections 1 to 6 of the *Milk, Frozen Desserts* and *Ice Cream Mix Regulations* of the Boston Health Department; Sections 55 to 71 of the *Regulations of the Board of Health of the city of Somerville*; Article VI, Sections 4 to 11 of the *Health Regulations of the town of Brookline*.

CONCLUSION

The respondents respectfully submit that the decree of the District Court should be affirmed.

Respectfully submitted.

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APRIL 1939.

APPENDIX A

The tables in this appendix are exact reproductions of statistics from the files of the Department of Agriculture which were introduced in evidence as Exhibits 3, 4, 5, and 6 at pages 20–21 of the transcript of the testimony taken at the hearings held December 10, 11, and 12, 1935, prior to the original issuance of Order No. 4. The record of those hearings was attached to the Master's report as Appendix A (R. Vol. II, 6) and is before this Court as an original exhibit (R. Vol. I, 134).

Petitioners, in connection with their argument that the Secretary should have reexamined the available statistical data at the time of issuing the amendments to the order, have pointed to certain tables published by the Department of Agriculture in February 1937 and reproduced as an exhibit in the Master's report (R. Vol. II, 207; Vol. III, 206–209). Petitioners have stated that these tables contain new statistical data which were not available to the Secretary when, on January 25, 1936, he proclaimed the August 1919–July 1929 base period. The error of this statement is demonstrated by comparing the statistics for the years 1909 to 1929, inclusive, which are contained in the following tables with the statistics for the same period which petitioners say did not become available until after January 25, 1936 (R., Vol. III, 206–209). It will be found that the figures are identical.

Maine: Milk, whole. Wholesale price per 100 pounds received by farmers in Maine, 1909–35, by months

Year	January	February	March	April	May	June	July	August	September	October	November	December	Weighted average	Average
	Dollars	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*
1909	.....	.....	.....	.....	.....	.....	.....	1.65	1.70	1.86	1.90	1.96	.....	.....
1910	1.86	1.80	1.75	1.75	1.65	1.60	1.75	1.75	1.80	1.86	1.90	1.86	1.75	1.78
1911	1.80	1.70	1.60	1.55	1.50	1.55	1.65	1.70	1.75	1.86	1.90	1.96	1.70	1.71
1912	1.90	1.85	1.80	1.75	1.65	1.65	1.75	1.80	1.85	1.95	2.05	2.05	1.85	1.84
1913	1.95	1.90	1.85	1.80	1.70	1.65	1.80	1.90	1.95	2.00	2.10	2.10	1.90	1.89
1914	2.05	1.95	1.85	1.70	1.65	1.60	1.75	1.85	1.95	2.10	2.15	2.15	1.90	1.90
1915	2.10	2.00	1.85	1.70	1.55	1.50	1.70	1.80	1.90	2.00	2.20	2.25	1.85	1.88
1916	2.15	2.10	2.05	1.90	1.85	1.75	1.90	2.00	2.05	2.45	2.55	2.75	2.10	2.13
1917	2.60	2.55	2.50	2.45	2.40	2.35	2.45	2.95	3.00	3.10	3.15	3.20	2.70	2.73
1918	3.50	3.60	3.50	3.25	3.05	2.95	3.25	3.40	3.50	3.55	3.65	4.15	3.50	3.52
1919	4.00	3.85	3.55	3.35	3.10	3.00	3.35	3.45	3.55	3.65	3.85	3.85	3.50	3.55
1920	3.75	3.70	3.65	3.50	3.30	3.20	3.50	3.75	3.75	3.75	3.90	3.55	3.60	3.61
1921	3.30	2.80	2.70	2.65	2.45	2.50	2.80	3.10	3.15	3.15	3.05	2.55	2.85	2.86
1922	2.45	2.35	2.20	2.25	2.20	2.15	2.40	2.80	2.60	2.85	2.90	2.95	2.45	2.49
1923	2.95	2.90	2.85	2.55	2.40	2.35	2.55	2.85	2.90	3.00	3.10	3.05	2.75	2.79
1924	2.95	2.60	2.40	2.15	2.15	2.15	2.40	2.55	2.55	2.70	2.80	2.75	2.50	2.52
1925	2.70	2.60	2.45	2.40	2.25	2.25	2.45	2.65	2.75	2.85	2.90	2.80	2.55	2.59
1926	2.75	2.70	2.60	2.55	2.50	2.25	2.50	2.60	2.65	2.70	2.90	2.90	2.60	2.63
1927	2.80	2.80	2.75	2.70	2.50	2.40	2.55	2.80	2.95	3.00	3.05	3.10	2.75	2.78
1928	3.05	3.00	2.90	2.60	2.50	2.45	2.70	2.90	2.90	3.00	3.15	3.15	2.85	2.86
1929	3.10	3.05	2.95	2.80	2.70	2.50	2.75	2.85	2.95	2.95	2.90	2.80	2.85	2.86
1930	2.60	2.60	2.50	2.50	2.40	2.30	2.45	2.70	2.75	2.65	2.55	2.30	2.50	2.53
1931	2.15	1.95	1.95	1.90	1.85	1.80	1.85	2.10	2.30	2.30	2.05	1.80	2.00	2.00
1932	1.60	1.60	1.55	1.55	1.60	1.45	1.70	1.90	1.85	1.85	1.85	1.85	1.70	1.70
1933	1.70	1.45	1.45	1.45	1.50	1.70	1.75	1.95	1.90	1.85	1.95	1.95	1.70	1.72
1934	1.95	1.95	1.85	1.85	1.75	1.70	1.85	1.90	1.95	2.05	2.20	2.15	1.90	1.93
1935	2.20	2.20	2.20	2.45	2.45	2.30	2.05	2.05	2.15	2.15	2.35	.....	.....	.....

Compiled by the Division of Crop and Livestock Estimates, Bureau of Agricultural Economics, United States Department of Agriculture.

New Hampshire: Milk, whole. Wholesale prices received by farmers per hundredweight, 1909–35, by months

Year	January	February	March	April	May	June	July	August	September	October	November	December	Weighted average	Simple average
	Dollars	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*
1909								1.80	1.90	2.05	2.15	2.15		
1910	2.10	2.00	1.90	1.85	1.60	1.55	1.80	1.85	1.95	2.00	2.05	2.05	1.90	1.89
1911	1.95	1.90	1.80	1.70	1.60	1.55	1.85	2.00	2.05	2.10	2.15	2.15	1.90	1.90
1912	2.05	2.00	1.95	1.75	1.60	1.55	1.85	1.95	2.00	2.15	2.25	2.25	1.95	1.95
1913	2.20	2.15	2.05	1.95	1.75	1.70	1.95	2.10	2.15	2.25	2.35	2.35	2.05	2.06
1914	2.20	2.10	2.00	1.90	1.70	1.60	1.90	2.00	2.00	2.25	2.35	2.35	2.00	2.02
1915	2.20	2.10	1.95	1.85	1.70	1.60	1.90	2.00	2.05	2.20	2.35	2.35	2.00	2.02
1916	2.25	2.15	2.05	1.90	1.75	1.65	1.95	2.05	2.10	2.50	2.60	2.65	2.10	2.13
1917	2.55	2.50	2.45	2.30	2.30	2.20	2.50	3.10	3.15	3.35	3.35	3.40	2.75	2.77
1918	3.75	3.75	3.70	3.50	3.10	3.00	3.40	3.70	3.80	4.00	4.20	4.20	3.65	3.66
1919	4.00	3.80	3.60	3.50	3.25	3.15	3.55	3.80	3.85	4.00	4.25	4.25	3.75	3.75
1920	4.05	3.90	3.85	3.65	3.40	3.30	3.65	3.95	4.00	4.05	4.10	3.90	3.80	3.83
1921	3.75	3.00	2.80	2.70	2.45	2.40	2.80	3.05	3.15	3.20	3.20	3.00	2.95	2.97
1922	2.50	2.45	2.45	2.35	2.15	2.15	2.50	2.55	2.65	2.90	3.00	3.00	2.55	2.55
1923	2.95	2.90	2.90	2.60	2.50	2.45	2.75	3.00	3.05	3.10	3.40	3.25	2.90	2.90
1924	3.20	2.75	2.40	2.25	2.25	2.25	2.55	2.75	3.05	3.05	3.00	3.00	2.70	2.71
1925	2.95	2.90	2.55	2.55	2.35	2.35	2.70	2.90	2.95	3.05	3.05	3.00	2.75	2.78
1926	2.95	2.90	2.85	2.75	2.70	2.45	2.80	2.85	2.95	2.95	3.10	3.20	2.85	2.87
1927	3.00	3.00	2.80	2.75	2.60	2.50	2.60	2.80	3.05	3.10	3.25	3.30	2.85	2.90
1928	3.15	3.00	2.95	2.75	2.60	2.55	2.75	2.95	2.95	3.05	3.25	3.25	2.90	2.93
1929	3.25	3.20	3.15	3.05	2.95	2.65	2.90	3.05	3.10	3.15	3.15	3.05	3.05	3.05
1930	2.90	2.85	2.75	2.75	2.65	2.55	2.70	3.00	3.05	2.95	2.80	2.80	2.80	2.79
1931	2.30	2.10	2.10	2.05	2.00	1.95	2.10	2.25	2.45	2.40	2.15	1.85	2.15	2.14
1932	1.70	1.70	1.65	1.65	1.65	1.55	1.75	1.95	1.95	1.95	2.00	2.00	1.80	1.79
1933	1.70	1.50	1.45	1.45	1.45	1.55	1.70	1.95	1.90	1.90	2.00	2.00	1.70	1.71
1934	2.00	2.05	1.90	1.90	1.85	1.80	1.90	1.95	2.00	2.05	2.10	2.30	2.00	1.98
1935	2.30	2.30	2.30	2.45	2.45	2.10	2.10	2.15	2.20	2.20	2.30			

Compiled by the Division of Crop and Livestock Estimates, Bureau of Agricultural Economics, U. S. Department of Agriculture.

Vermont: Milk, whole, wholesale prices per 100 pounds received by farmers in Vermont, 1909–35, by months

Year	January	February	March	April	May	June	July	August	September	October	November	December	Weighted average	Average
	Dollars	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*	*Dollars*
1909								1.30	1.40	1.60	1.70	1.75		1.55
1910	1.75	1.70	1.55	1.50	1.25	1.20	1.30	1.45	1.55	1.70	1.80	1.80	1.80	1.65
1911	1.80	1.75	1.55	1.25	1.10	1.05	1.20	1.40	1.50	1.65	1.80	1.80	1.45	1.49
1912	1.70	1.65	1.60	1.40	1.25	1.10	1.20	1.50	1.50	1.65	1.80	1.85	1.45	1.52
1913	1.80	1.70	1.65	1.50	1.30	1.25	1.35	1.50	1.55	1.70	1.80	1.85	1.55	1.58
1914	1.80	1.70	1.60	1.40	1.20	1.20	1.25	1.45	1.50	1.65	2.00	2.00	1.55	1.56
1915	1.85	1.75	1.60	1.35	1.15	1.10	1.20	1.45	1.50	1.65	1.85	1.90	1.50	1.54
1916	1.80	1.75	1.65	1.50	1.45	1.35	1.45	1.55	1.65	2.05	2.15	2.15	1.65	1.71
1917	2.15	2.10	2.05	2.05	2.00	1.85	2.05	2.55	2.60	2.10	2.25	2.25	2.25	2.42
1918	3.35	3.30	3.15	2.85	2.50	2.25	2.55	2.90	3.10	3.55	3.85	3.85	3.00	3.10
1919	3.75	3.55	3.30	3.10	2.95	2.75	3.00	3.35	3.45	3.65	3.95	4.10	3.30	3.41
1920	3.85	3.75	3.55	3.15	2.95	2.90	3.10	3.60	3.60	3.70	3.80	3.85	3.40	3.46
1921	3.15	2.75	2.45	2.30	1.90	1.85	2.20	2.60	2.70	2.85	2.90	2.70	2.45	2.53
1922	2.30	2.25	2.05	1.90	1.85	1.85	2.10	2.30	2.60	2.75	2.90	3.00	2.30	2.31
1923	2.90	2.75	2.65	2.30	2.20	2.15	2.30	2.60	2.75	2.90	3.10	2.95	2.60	2.69
1924	2.80	2.80	2.20	1.90	1.85	1.85	2.10	2.30	2.60	2.60	2.70	2.75	2.25	2.36
1925	2.55	2.55	2.25	2.30	2.10	2.05	2.30	2.50	2.70	2.90	2.90	2.85	2.45	2.51
1926	2.70	2.65	2.50	2.35	2.25	2.20	2.35	2.50	2.70	2.85	2.95	3.00	2.55	2.58
1927	2.70	2.65	2.60	2.55	2.40	2.25	2.30	2.65	2.90	3.05	3.20	3.25	2.65	2.71
1928	3.00	2.85	2.75	2.45	2.25	2.30	2.50	2.80	2.85	3.00	3.15	3.10	2.70	2.76
1929	3.10	2.95	2.80	2.70	2.55	2.40	2.40	2.65	3.05	3.10	3.10	2.90	2.80	2.85
1930	2.65	2.60	2.50	2.30	2.25	2.15	2.30	2.60	2.80	2.75	2.65	2.30	2.45	2.50
1931	2.00	1.90	1.85	1.75	1.65	1.60	1.65	1.95	2.10	2.10	2.00	1.60	1.85	1.86
1932	1.50	1.50	1.45	1.35	1.35	1.25	1.40	1.60	1.60	1.65	1.70	1.65	1.50	1.50
1933	1.40	1.20	1.25	1.10	1.20	1.35	1.50	1.80	1.75	1.75	1.90	1.85	1.80	1.60
1934	1.80	1.80	1.85	1.65	1.55	1.50	1.65	1.65	1.75	1.85	1.95	2.05	1.70	1.74
1935	2.05	2.10	2.10	2.15	2.00	1.80	1.75	1.75	1.80	1.80	2.10			

Compiled by the Division of Crop and Livestock Estimates, Bureau of Agricultural Economics, United States Department of Agriculture.

Massachusetts: Milk, whole (wholesale). Farm price for all milk sold per hundredweight, 1909–35, by months

Year	January	February	March	April	May	June	July	August	September	October	November	December	Average
	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars	Dollars
1909	2.40	2.40	2.30	2.15	2.00	2.00	2.00	2.15	2.20	2.40	2.55	2.70	2.28
1910	2.70	2.60	2.50	2.40	2.20	2.10	2.35	2.50	2.55	2.55	2.55	2.55	2.46
1911	2.45	2.45	2.30	2.20	2.10	2.10	2.35	2.55	2.55	2.65	2.70	2.70	2.43
1912	2.60	2.60	2.60	2.35	2.15	2.00	2.25	2.30	2.35	2.60	2.80	2.80	2.45
1913	2.70	2.65	2.55	2.45	2.20	2.20	2.45	2.50	2.50	2.75	2.90	2.90	2.56
1914	2.80	2.70	2.60	2.40	2.20	2.10	2.35	2.35	2.35	2.60	2.85	2.85	2.51
1915	2.70	2.60	2.50	2.40	2.20	2.10	2.30	2.35	2.50	2.60	2.85	2.85	2.50
1916	2.70	2.60	2.50	2.40	2.20	2.10	2.30	2.30	2.40	2.70	2.95	2.95	2.51
1917	2.80	2.70	2.60	2.60	2.50	2.40	2.65	2.90	3.15	3.40	3.40	3.40	2.88
1918	3.85	3.90	4.15	3.95	3.70	3.60	3.80	4.00	4.05	4.15	4.30	4.30	3.96
1919	4.45	4.40	4.35	4.30	4.15	4.15	4.40	4.65	4.55	4.75	4.95	4.95	4.50
1920	4.70	4.60	4.60	4.50	4.40	4.30	4.40	4.50	4.60	4.60	4.60	4.60	4.52
1921	4.80	4.25	4.00	3.75	3.50	3.50	3.60	3.70	3.80	3.80	3.80	3.70	3.82
1922	3.45	3.35	3.20	3.10	2.90	2.90	2.90	3.00	3.25	3.25	3.35	3.40	3.16
1923	3.40	3.40	3.40	3.20	3.10	3.10	3.30	3.40	3.55	3.60	3.70	3.60	3.40
1924	3.60	3.40	3.20	2.95	2.95	2.80	2.90	3.00	3.20	3.20	3.40	3.30	3.16
1925	3.20	3.00	3.00	2.90	2.90	2.70	2.80	3.00	3.25	3.30	3.55	3.55	3.11
1926	3.55	3.30	3.15	3.10	3.10	2.85	3.05	3.30	3.30	3.30	3.40	3.20	3.22
1927	3.20	3.[illegible]	2.90	2.90	2.90	2.85	3.00	3.25	3.50	3.50	3.50	3.50	3.17
1928	3.40	3.25	3.25	3.15	3.05	3.00	3.10	3.20	3.35	3.50	3.60	3.55	3.30
1929	3.40	3.40	3.30	3.30	3.20	3.10	3.30	3.50	3.60	3.60	3.60	3.56	3.40
1930	3.50	3.50	3.30	3.30	3.20	3.00	3.30	3.40	3.55	3.60	3.60	3.50	3.36
1931	3.30	2.95	2.95	2.70	2.70	2.65	2.85	2.85	2.95	2.90	2.80	2.40	2.[illegible]
1932	2.25	2.35	2.35	2.20	2.20	2.20	2.25	2.40	2.40	2.50	2.30	2.25	2.30
1933	2.25	2.10	2.00	1.95	1.90	2.15	2.30	2.25	2.30	2.25	2.20	2.20	2.15
1934	2.40	2.40	2.40	2.35	2.30	2.45	2.20	2.35	2.35	2.60	2.75	2.70	2.44
1935	2.85	2.70	2.70	2.80	2.70	2.70	2.70	2.80	2.75	2.80	3.00	.....	.....

Compiled from "Price paid Massachusetts Farmers for Milk" by Roger F. Hale, and from records of the Division of Crop and Livestock Estimates, Bureau of Agricultural Economics.

APPENDIX B

The appendix to the brief submitted by the petitioner in *H. P. Hood & Sons, Inc., et al.* v. *United States et al.*, Number 772, discusses the interpretation to be given to Section 8c (5) (F) of the Agricultural Marketing Agreement Act of 1937. That section follows:

> Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

The petitioner asserts that the effect of this section is to relieve a cooperative organization of producers from any obligation to make equalization payments under an order issued pursuant to the Act.[61] In the body of its brief the petitioner con-

[61] In its brief filed in *United States of America* v. *Rock Royal Cooperative, Inc. et al.*, No. 771, the appellee Central New York Cooperative Association, Inc., for the first time

tends that as a result of this provision a cooperative can draw from the equalization pool when it is entitled to do so, but refuse to make equalization payments when otherwise the terms of the order would require such payments to be made.

The respondents submit, (1) that the evidence in this case does not entitle petitioner to raise this issue, and (2) that petitioner's construction of Section 8c (5) (F) is erroneous.

1. *Petitioner is not entitled to raise this issue.*— The fact is that not one of the cooperative organizations in the Boston market has hitherto claimed that it is exempt from the provisions of Order No. 4 as amended because it is a cooperative, or that it is entitled to refuse to make equalization payments by reason of the provisions of Section 8c (5) (F). The record is devoid of any evidence that any cooperative has refused to make equalization payments when called upon to do so, nor is there any evidence in the record that the effect of Section 8c (5) (F) has been to inflict any injury whatsoever upon petitioner; indeed, peti-

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makes the same contention. We have pointed out in the Government brief in that case the absence from the record of any evidence to support its contention that it would be able to pay more to its producers if the plan were not operative or were ineffective than it could pay through participation in the equalization pool with the plan in effect. We have pointed out also in that brief that its previous claim that it was exempt from the provisions of the order because it sold only milk from farms owned by it is untenable. The comments in this Appendix demonstrate that its construction of the provisions of Section 8c (5) (F), by which it claims exemption from the plan altogether, a contention neither pleaded nor argued below, and made for the first time in its brief filed in this Court, is equally unsound.

tioner in its brief makes no claim that any such injury in fact has been inflicted or is threatened. The discrimination inherent in the section as it is construed by petitioner is abstract and hypothetical in character and has never had practical consequences in the slightest degree. In these circumstances the petitioner is not entitled to raise the question that this provision of the statute is so arbitrary and unreasonable as to be unconstitutional under the due process clause. As this Court said in *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 289:

> A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Wynne*, 224 U. S. 354; *Kansas City Southern Ry. Co.* v. *Anderson*, 233 U. S. 325. Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. *Yazoo & Mississippi Valley R. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Jeffrey Manufacturing Co.* v. *Blagg*, 235 U. S. 571, 576.

Since "it does not appear that the alleged unconstitutional feature of which he complains has injured him or operated to deprive him of any right under the Federal Constitution" the petitioner has no standing to complain. *Gorieb.* v. *Fox*, 274 U. S. 597, 606, and cases cited therein. See also *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550, and cases cited therein.

2. *Petitioner's construction of Section 8c (5) (F) is erroneous.*—The terms of Section 8c (5) (F) do

not relieve cooperative organizations from the obligation to make equalization payments under an order. The section doubtless does permit a cooperative to pay its members less than the blended price payable under an order if the lower payments are called for by the contracts with its members. It may be assumed that it was placed in the statute to give cooperatives that privilege. But nothing in its language requires that it be construed so as to relieve cooperatives of the obligation of making equalization payments and obviously such a construction would make the entire regulatory plan of the Act unworkable and would raise grave doubts as to the constitutionality of the Act. Recognized canons of construction dictate that a construction leading to such results is not to be embraced unless inevitably required by the language of the Act read as a whole.

In most metropolitan marketing areas cooperative organizations of producers now play an extremely important role in the handling and distribution of milk. This fact is clearly demonstrated by the record here and in *United States of America* v. *Rock Royal Cooperative, Inc., et al.*, No. 771. To permit these large organizations handling large quantities of milk to remain outside of the scope of an order which fixes minimum prices and establishes a market-wide equalization pool would not only have the effect of preventing the order from operating, but would establish a real advantage in favor of cooperatives which, in contrast to the illusory advantage alleged by certain of the appellees in *United States of America* v. *Rock Royal*

Cooperative, Inc., et al., might raise [illegible]s questions as to the constitutionality of such [illegible]n. In markets such as New York and Boston, where the cooperative organizations handle extremely large quantities of milk, no system of regulation can possibly operate with those organizations beyond its scope. It must be assumed that Congress was aware of this situation and that it did not intend to confer an exemption upon cooperatives which would prevent the system of regulation provided by the Act from being effective.

Furthermore, if, as the petitioners imply here and as the appellee Central New York Cooperative Association, Inc., urges in the *Rock Royal* case, cooperatives are exempt from accounting for milk on the bases of minimum class prices and from sharing the surplus burden through the equalization pool, there would be some basis, not present under the order as issued, for the claim of discrimination made in the *Rock Royal* case on behalf of the proprietary handlers. As has been pointed out in the appellants' brief in that case (pp. 130–149), the provisions of Section 8c (5) (F) do not discriminate in favor of cooperatives or put proprietary handlers at a competitive disadvantage. Whatever the cooperative members might save as stockholders by throwing expenses back upon themselves as producers, they lose as producers. On the other hand, if the uniform price were enforced upon cooperatives as handlers, these expenses which they could not pass on to themselves as producers would fall upon them as members of the cooperative handling

enterprise. The expenses must be borne by them either way. Hence any saving which the cooperative might seem to accomplish through its freedom from returning the uniform price is illusory because its members and its producers being the same, they bear the expenses either way. The requirement that proprietary handlers pay the uniform price, on the other hand, merely protects producers selling to such handlers against having thrown back upon them the losses or expenses which the proprietary enterprise incurs through competition. Consequently, as the order operates, the persons who comprise the proprietary handlers, its owners or stockholders bear the expenses, just as the persons who comprise the cooperatives, the producer members, bear its expenses. The basis of competition is a wholly equal one between two different types of handlers. But if the contention of the petitioners and of the Central New York Cooperative should be sustained, there would be a real discrimination in favor of cooperatives. They would be free from the requirement of accounting for their milk at the uniform class prices and free from bearing their share of the burden of the surplus through payments into the equalization fund. If the provision should be so construed and so applied, the competitive advantage to the cooperatives, which in such a case would be definitely attributable to the Act, would be a real advantage, arbitrary and discriminatory against proprietary handlers, and would lend real substance to a contention of the proprietary handlers that the Act was unconstitutionally discriminatory. Obviously such a con-

struction is to be avoided unless the language of the Act clearly requires it."

That this is not the case is clear from those portions of the legislative history to which both petitioners and Central New York Cooperative refer to support its claim. The reference is to the Reports submitted by the committees of both Houses of Congress which considered the bill and to a statement made in the course of debate upon the floor of the Senate. The statement in the Committees' reports merely paraphrases the words of the section and affords no support for petitioner's construction. The meaning of the statement made on the floor of the Senate in the course of debate is not altogether free from doubt. The statement was made in the course of the following colloquy (Congressional Record, 74th Congress, First Session, page 11139):

> Mr. COPELAND. * * * The amendment which we have before us provides that a cooperative association shall not sell its milk

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" In the case of a *bona fide* cooperative which carries its proportionate share of the burden of surplus milk this discrimination might not be unduly great, but such a construction of the statute would permit dealers to escape regulation by exerting economic pressure upon producers, and thus compelling them to organize into cooperative associations which can be managed and controlled by the dealers in their own interests. An example of this type of organization is the Central New York Co-Operative Association, Inc., appellee in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, No. 771, which was organized to take advantage of the failure of the classified-price scheme in effect in the State of New York under New York State milk control to include a provision for market-wide equalization. See Government's brief in the *Rock Royal* case, pp. 193–194.

or products to any handlers at prices less than those fixed. In New York State there are a great many cooperatives that sell their milk directly to consumers. There is nothing in the proposed amendments which provides that the cooperative that sells milk and milk products directly to the consumer shall charge itself with the prices fixed. If this condition shall be allowed to exist, it will be a short time only before the entire fluid market in every city will be taken away from the regular handlers of milk who are purchasing their supply directly from the producers, as they will be required to pay the prices set by the order. It is further contended that the cooperatives, in the absence of a set resale price, and with the exemption I have mentioned, would be able to sell milk at a lower figure, and return to their members the net proceeds of their sales, regardless of what they may be.

A conference was held in Syracuse in February 1934, as I remember. The producers did not agree "upon acceptance of the proposed program or upon any other plan of production adjustment" which included a processing tax.

Mr. MURPHY. Mr. President, if the Senator will pardon me, there is no processing tax in this provision. Furthermore, in the case of the particular producers to whom the Senator refers, there is not any obligation upon them to come in under this provision at all. They are free to stay out. If they do not wish to come in and have their condition bettered, and a proper price paid them for their milk, this is a matter of their election. It will not be imposed upon them.

I will make this reservation to that statement. The Senator from Virginia [Mr.

> Byrd] the other day offered an amendment with which I am in sympathy practically in its entirety. He pointed out that the powers here given the Secretary of Agriculture authorize him to issue an order on the petition of 50 percent of the handlers. The Senator from Virginia contended, and rightly, that that shut the producers out of a voice in the agreement. I will say now that I am prepared to accept, and I think the chairman of the committee is prepared to accept, an amendment which will require producer consent as to that. The percentage fixed is two-thirds.

It is apparent that when Senator Murphy referred to producers who were "free to stay out" of the regulatory plan, he did not refer to the provisions of Section 8c (5) (F). His remark was prompted by Senator Copeland's previous statement that certain producers had met at Syracuse in February 1934 and had not agreed upon acceptance of the proposed program. Senator Murphy's rejoinder was obviously intended to emphasize that if the majority of the producers in a given area did not vote for the proposed regulation, no regulation would be imposed. This is clearly indicated by his statement immediately following that he was prepared to accept an amendment to the statute which would require the consent of two-thirds of the producers before an order could be issued.

The language of Section 8c (5) (F) does not bear out petitioner's contention. It is significant that the section provides that the cooperatives may blend the "net proceeds" of all of its sales and make distribution thereof to its producers. The use of the words *net proceeds* is highly important. It would have been unnecessary for Congress to

use the words "net proceeds" had it meant thereby merely the aggregate received for the sale of milk, less the costs of marketing and processing as petitioner suggests. The section is permissive in character and no permission was necessary to allow the cooperative to deduct its operating cost. This is particularly so inasmuch as the section goes on to provide that the distribution shall be in accordance with the contract between the association and its members, and such a contract always provides for the deduction of operating expenses. By referring to net proceeds, Congress intended to denote not merely the deduction of operating costs, but also the deduction of the amount of any obligations which the cooperative was legally required to pay to the equalization pool under the provisions of the order.

The settled administration interpretation of the act is also persuasive, especially in view of the reenactment of these provisions without change after two years of application to cooperatives. If any ambiguity exists in the act it should be resolved in favor of the construction given to the act by the Secretary in issuing Order No. 4 and other orders. A list of these orders appears *supra* at p. 87. None of the orders which provide for equalization pools exempt cooperative associations. Administrative interpretation is entitled to great weight when the court is called upon to construe a statute (See *supra*, pp. 86–91).

Central New York Cooperative Association, Inc., premises its argument in part on the use of the word "purchase" in Sections 8c (5) (A) and 8c (5) (B). This argument is based on a narrow interpretation of the word "purchase." The leg-

islative history indicates that the word "purchase" is used in the sense of "acquire by delivery" from producers and should be given its broad meaning of "acquire control over." See House Report No. 1241, pp. 9–10. Section 8c (1) specifically provides that orders shall be applicable to "* * * associations of producers, and others engaged in the handling * * *." That clear provision would be meaningless if cooperatives which act as handlers were to be exempted by Section 8c (5). Furthermore, if Congress had intended to treat cooperatives, which are also handlers, merely as agents of producers and to exempt them from the class price requirements and from participation in the equalization pool, the provisions of Section 8c (5) (F) expressly exempting them from the requirement that they return the uniform price to producers would have been wholly unnecessary. The statute should not be construed so as to make any of its provisions futile and meaningless.

In short, the language of the Act does not require the exemption of cooperatives from the minimum price requirements or from participation in the equalization pool and the legislative history does not support the exemption. To read such a broad exemption into the language would make some of the act's provisions wholly meaningless and futile, would make the Act completely unworkable and would throw grave doubt upon its constitutionality. There is no warrant for such a construction and it should be rejected.

U. S. GOVERNMENT PRINTING OFFICE 1939

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

Division of Marketing and Marketing Agreements

ANNOTATED COMPILATION

OF

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1937

PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the annotations.

ANNOTATED COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED [1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy);

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such *orderly marketing conditions for agricultural commodities in interstate commerce as will establish* [3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect

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[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will reestablish".

to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

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[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores), or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[1] of milk during a representative period of time.

[1] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefore from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size,

or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [6] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [7] such producers, or both, to the end that the total quantity thereof to be purchased or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

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[6] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.

[7] The italicized words were substituted, by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of

such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such

commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATIONS REPRESENTATIONS

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTIONS

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order:

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: *Provided*, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) *The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated mar-*

keting agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, making adjustments in such prices.[8]

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[9]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1), of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or

[8] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

[9] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided

further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2) [10] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[11] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[12]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling,

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[10] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

[11] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[12] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within*

the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.[13]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[14] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000: Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and books of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provisions of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22. (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States

[13] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[14] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[15]

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows: [16]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

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[15] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title", wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment", wherever they appeared, and inserting in lieu thereof the word "any".

[16] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in footnotes 2 to 9 inclusive and 11 to 14 inclusive, supra.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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Issued July 28, 1937

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION

COMPILATION OF ORDER NO. 4 REGULATING THE HANDLING OF MILK IN THE GREATER BOSTON, MASS., MARKETING AREA, WITH THE INCORPORATION OF AMENDMENT NO. 1 OF AUGUST 1937

Order No. 4, issued by the Secretary of Agriculture February 7, 1936, effective 12:01 a. m., E. S. T., February 9, 1936; Amendment issued by the Secretary July 28, 1937, effective 12:01 a. m., E. S. T., August 1, 1937

The findings, made by the Secretary at the time of issuance of Order No. 4 and the amendment to Order No. 4, have been eliminated from this document for the sake of brevity.

ARTICLE I—DEFINITIONS

SECTION 1. *Terms.*—The following terms shall have the following meanings:

1. "Act" means the Agricultural Marketing Agreement Act of 1937 which reenacts and further amends Public, No. 10, 73d Congress, as amended.

2. "Secretary" means the Secretary of Agriculture of the United States.

3. "Greater Boston, Massachusetts, Marketing Area", hereinafter called the "Marketing Area", means the territory included within the boundary lines of the cities and towns of Arlington, Belmont, Beverly, Boston, Braintree, Brookline, Cambridge, Chelsea, Dedham, Everett, Lexington, Lynn, Malden, Marblehead, Medford, Melrose, Milton, Nahant, Needham, Newton, Peabody, Quincy, Reading, Revere, Salem, Saugus, Somerville, Stoneham, Swampscott, Wakefield, Waltham, Watertown, Wellesley, Weymouth, Winchester, Winthrop, and Woburn, Massachusetts.

4. "Person" means any individual, partnership, corporation, association, and any other business unit.

5. "Producer" means any person who, in conformity with the health regulations which are applicable to milk which is sold for consumption as milk in the Marketing Area, produces milk and distributes, or delivers to a handler, milk of his own production.

6. "Handler" means any person, irrespective of whether such person is a producer or an association of producers, wherever located or operating, who engages in such handling of milk, which is sold as milk or cream in the Marketing Area, as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in milk and its products.

7. "Market Administrator" means the person designated pursuant to article II as the agency for the administration hereof.

8. "Delivery period" means the current marketing period from the first to, and including, the fifteenth day of each month, and from the sixteenth to, and including, the last day of each month.

ARTICLE II—MARKET ADMINISTRATOR

SECTION 1. *Selection, Removal, and Bond.*—The Market Administrator shall be selected by the Secretary and shall be subject to removal by him at any time. The Market Administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

SEC. 2. *Compensation.*—The Market Administrator shall be entitled to such reasonable compensation as may be determined by the Secretary.

SEC. 3. *Powers.*—The Market Administrator shall have power:

1. To administer the terms and provisions hereof;

2. To receive, investigate, and report to the Secretary complaints of violations of the terms and provisions hereof.

SEC. 4. *Duties.*—The Market Administrator, in addition to the duties hereinafter described, shall:

1. Keep such books and records as will clearly reflect the transactions provided for herein;

2. Submit his books and records to examination by the Secretary at any and all times;

3. Furnish such information and such verified reports as the Secretary may request;

4. Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the Market Administrator;

5. Publicly disclose to handlers and producers, unless otherwise directed by the Secretary, the name of any person who, within 15 days after the date upon which he is required to perform such acts, has not (a) made reports pursuant to article V or (b) made payments pursuant to article VIII;

6. Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions hereof; and

7. Pay, out of the funds provided by article X, (a) the cost of his bond and of the bonds of such of his employees as handle funds entrusted to the Market Administrator, (b) his own compensation, and (c) all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties.

SEC. 5. *Responsibility.*—The Market Administrator, in his capacity as such, shall not be held responsible in any way whatsoever to any handler, or to any other person, for errors in judgment, for mistakes, or for other acts either of commission or omission, except for his own willful misfeasance, malfeasance, or dishonesty.

ARTICLE III—CLASSIFICATION OF MILK

SECTION 1. *Sales and Use Classification.*—Milk purchased or handled by handlers shall be classified as follows:

1. All milk sold or distributed as milk, chocolate milk, or flavored milk and all milk not specifically accounted for as Class II milk shall be Class I milk; and

2. Milk specifically accounted for (a) as being sold, distributed, or disposed of other than as milk, chocolate milk, or flavored milk and (b) as actual plant shrinkage within reasonable limits shall be Class II milk.

SEC. 2. *Inter-Handler or Non-Handler Sales.*—Milk, including skim milk, sold by a handler to another handler or to a person who is not a handler and who distributes milk or manufactures milk products shall be presumed to be Class I milk. In the event that such selling handler, on or before the date fixed for filing reports pursuant to article V, notifies the Market Administrator that such milk, or a part thereof, has been sold or used by such purchaser other than as Class I milk, such milk, or part thereof, shall be classified as Class II milk; provided, that if such selling handler does not, on or before the fifteenth day after the end of the delivery period during which such sale was made, furnish proof satisfactory to the Market Administrator in support of the above notification, such milk or part thereof shall then be classified as Class I milk and so included in the statement rendered to the selling handler pursuant to paragraph 3 of section 1 of article VIII.

ARTICLE IV—MINIMUM PRICES

SECTION 1. *Class I Prices to Associations of Producers.*—Each handler shall pay any association of producers for Class I milk containing 3.7 percent butterfat not less than the following prices:

1. $3.31 per hundredweight for such milk delivered from the plant of such association to such handler's plant located not more than 40 miles from the State House in Boston;

2. $3.26 per hundredweight for such milk delivered from the plant of such association to such handler at a railroad delivery point not more than 40 miles from the State House in Boston; and

3. If such milk is delivered containing butterfat more or less than 3.7 percent such handler shall add or subtract, as the case may be, a differential for each one-tenth of one percent above or below 3.7 percent, which differential is the result of dividing by 330 the cream price used in paragraph 1 of section 3 of this article.

SEC. 2. *Class I Prices to Producers.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class I milk delivered by them, not less than the following prices:

1. $3.19 per hundredweight for such milk delivered from producers' farms to such handler's plant located not more than 40 miles from the State House in Boston;

2. $3.01 per hundredweight for such milk delivered from producers' farms to such handler's plant located more than 40 miles from the State House in Boston, less an amount per hundredweight equal to the freight from the railroad shipping point for such handler's plant to such handler's railroad delivery point in the Marketing Area. Such freight shall be calculated according to applicable rail tariffs for the transportation in carload lots of milk in 40-quart cans and each such can shall be considered to contain 85 pounds of milk;

3. For the purpose of this section the milk which was sold or distributed, during each delivery period, by each handler as Class I

milk shall be presumed to have been that milk which was received at such handler's plant located not more than 40 miles from the State House in Boston (a) directly from producers' farms and (b) from the nearest plants located more than 40 miles from the State House in Boston.

SEC. 3. *Class II Prices.*—Each handler shall pay producers, in the manner set forth in article VIII, for Class II milk not less than the following prices per hundredweight:

1. In the case of such milk delivered to a handler's plant located not more than 40 miles from the State House in Boston, a price which the Market Administrator shall calculate as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, multiply the result by 3.1, and add 2.125 times the average of the weekly quotations per pound of domestic, 90-92 score, cream in bags delivered in carload lots at New York, as published by the Oil, Paint and Drug Reporter during such delivered period, and subtract 42 cents; and

2. In the case of such milk delivered to a handler's plant located more than 40 miles from the State House in Boston, the price calculated by the Market Administrator, pursuant to paragraph 1 of this section, minus 6 cents.

SEC. 4. *Sales Outside the Marketing Area.*—The price to be paid by each handler to associations of producers or to producers, in the manner set forth in article VIII, for milk utilized as Class I milk outside the Marketing Area, shall be the price applicable pursuant to sections 1 and 2 of this article adjusted by (a) the difference between such applicable price and the price ascertained by the Market Administrator as the prevailing price paid by processors for milk of equivalent use in the market where such Class I milk is utilized and (b) the difference between the freight allowance, if any, set forth in paragraph 2 of section 2 of this article and an amount equal to the carload freight rate approved by the Interstate Commerce Commission for movement of milk in 40-quart cans from the shipping point for the plant where such Class I milk is received from producers to the railroad delivery point serving the market where such Class I milk is sold; provided, that (1) if the market where such Class I milk is utilized is less than 10 miles from the plant where such Class I milk is received from producers, the railroad shipping point for such plant shall be presumed to be the railroad delivery point serving such market, and (2) if the market where such Class I milk is utilized is located in Barnstable, Plymouth, Norfolk, Dukes, and Nantucket Counties, Massachusetts, such handler's railroad delivery point in the Marketing Area shall be considered to be the railroad delivery point serving such market.

SEC. 5. *Publication of Class II Prices.*—On or before the fifth day after the end of each delivery period, the Market Administrator shall publicly announce the Class II price in effect for such delivery period.

ARTICLE V—REPORTS OF HANDLERS

SECTION 1. *Periodic Reports.*—On or before the eighth day after the end of each delivery period, each handler shall, except as set forth in section 1 of article VI, with respect to milk or cream which was, during such delivery period, (a) received from producers, (b) received from handlers, or (c) produced by such handler, report to the Market Administrator in the detail and form prescribed by the Market Administrator, as follows:—

1. The receipts at each plant from producers who are not handlers;
2. The receipts at each plant from any other handler, including any handler who is also a producer;
3. The quantity, if any, produced by such handler; and
4. The respective quantities of milk which were sold, distributed, or used, including sales to other handlers, for the purpose of classification pursuant to article III.

SEC. 2. *Reports as to Producers.*—Each handler shall report to the Market Administrator:

1. Within 10 days after the Market Administrator's request with respect to any producer for whom such information is not in the files of the Market Administrator, and with respect to a period or periods of time designated by the Market Administrator, (a) the name and address, (b) the total pounds of milk delivered, (c) the average butterfat test of milk delivered, and (d) the number of days upon which deliveries were made; and
2. As soon as possible after first receiving milk from any producer: (a) The name and address of such producer, (b) the date upon which such milk was first received, (c) the plant at which such producer delivered milk, and (d) the plant, if known, at which such producer delivered milk immediately prior to the beginning of delivery to such handler.

SEC. 3. *Reports of Payments to Producers.*—Each handler shall submit to the Market Administrator within 20 days after the end of each delivery period his producer payroll for such delivery period which shall show for each producer: (a) The total delivery of milk with the average butterfat test thereof and (b) the net amount of such producer's payment, with the prices, deductions, and charges involved.

SEC. 4. *Outside Cream Purchases.*—Each handler shall report, as requested by the Market Administrator, his purchases, if any, of bottling quality cream from handlers who receive no milk from producers, showing the quantity and the source of such such purchase and the cost thereof at Boston.

SEC. 5. *Verification of Reports.*—In order that the Market Administrator may submit verified reports to the Secretary pursuant to paragraph 3 of section 4 of article II, each handler shall permit the Market Administrator or his agent, during the usual hours of business, to (a) verify the information contained in reports submitted in accordance with this article and (b) weigh, sample, and test milk for butterfat.

ARTICLE VI—HANDLERS WHO ARE ALSO PRODUCERS

SECTION 1. *Application of Provisions.*—No provision hereof shall apply to a handler who is also a producer and who purchases no milk from producers or an association of producers, except that such handler shall make reports to the Market Administrator at such time and in such manner as the Market Administrator may request.

SEC. 2. *Milk Purchased from Producers.*—In the case of a handler who is also a producer and who purchased milk from producers, the Market Administrator shall, before making the computations set forth in article VII, (a) exclude from such handler's class I milk up to but not exceeding 90 percent of the quantity of milk produced and sold by him, (b) exclude the milk purchased by him in each class from other handlers, and (c) exclude from his remaining Class II milk the balance of the milk produced and sold by him.

ARTICLE VII—DETERMINATION OF UNIFORM PRICES TO PRODUCERS

SECTION 1. *Computation of Value of Milk for Each Handler.*—For each delivery period the Market Administrator shall compute, subject to the provisions of article VI, the value of milk sold or used by each handler, which was not purchased from other handlers, by (a) multiplying the quantity of such milk in each class by the price applicable pursuant to sections 2, 3, and 4 of article IV and (b) adding together the resulting value of each class.

SEC. 2. *Computation and Announcement of Uniform Prices.*—The Market Administrator shall compute and announce the uniform prices per hundredweight of milk delivered during each delivery period in the following manner:

1. Combine into one total the respective values of milk, computed pursuant to section 1 of this article, for each handler who made the report as required by section 1 of article V for such delivery period and who made the payments required by article VIII for milk received during the delivery period next preceding but one;

2. Add the total net amount of the differentials applicable pursuant to section 4 of article VIII;

3. Subtract the total amount to be paid to producers pursuant to paragraph 2 of section 1 of article VIII;

4. Divide by the total quantity of milk which is included in these computations except that milk required to be paid for pursuant to paragraph 2 of section 1 of article VIII;

5. Subtract not less than 4 cents nor more than 5 cents for the purpose of retaining a cash balance in connection with the payments set forth in paragraph 3 of section 1 of article VIII;

6. Add an amount which will prorate, pursuant to section 3 of this article, any cash balance available; and

7. On or before the twelfth day after the end of each delivery period mail to all handlers and publicly announce (a) such of these computations as do not disclose information confidential pursuant to the Act, (b) the blended price per hundredweight which is the result of these computations, and (c) the Class II price.

SEC. 3. *Proration of Cash Balance.*—For each delivery period the Market Administrator shall prorate, by an appropriate addition pur-

suant to section 2 of this article, the cash balance, if any, in his hands from payments made by handlers for milk received during the delivery period next preceding but one, to meet obligations arising out of paragraph 3 of section 1 of article VIII.

ARTICLE VIII—PAYMENTS FOR MILK

SECTION 1. *Time and Method of Payment.*—On or before the twenty-fifth day after the end of each delivery period, each handler shall make payment, subject to the butterfat differential set forth in section 3 of this article, for the total value of milk received during such delivery period as required to be computed pursuant to section 1 of article VII, as follows:

1. To each producer, except as set forth in paragraph 2 of this section, at the blended price per hundredweight computed pursuant to section 2 of article VII, subject to the differentials set forth in section 4 of this article, for the quantity of milk delivered by such producer;

2. To any producer, who did not regularly sell milk for a period of 30 days prior to the effective date hereof to a handler or to persons within the Marketing Area, at the Class II price, in effect for the plant at which such producer delivered milk, for all the milk delivered by such producer during the period beginning with the first regular delivery of such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month;

3. To producers, through the Market Administrator, by paying to or receiving from the Market Administrator, as the case may be, the amount by which the payments made pursuant to paragraphs 1 and 2 of this section are less than, or exceed, the value of milk as required to be computed for such handler pursuant to section 1 of article VII, as shown in a statement rendered by the Market Administrator on or before the twentieth day after the end of such delivery period.

SEC. 2. *Errors in Payments.*—Errors in making any of the payments prescribed in this article shall be corrected not later than the date for making payments next following the determination of such errors.

SEC. 3. *Butterfat Differential.*—If any producer has delivered to any handler during any delivery period milk having an average butterfat content other than 3.7 percent, such handler shall, in making the payments prescribed by paragraphs 1 and 2 of section 1 of this article to such producer, add for each one-tenth of 1 percent of average butterfat content above 3.7 percent or deduct for each one-tenth of 1 percent of average butterfat content below 3.7 percent an amount per hundredweight which shall be calculated by the Market Administrator as follows: Divide by 33 the weighted average price per 40-quart can of bottling quality cream in the Boston market, as reported by the United States Department of Agriculture for the delivery period during which such milk is delivered, subtract 8 cents, and divide the result by 10.

SEC. 4. *Location Differentials.*—The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:

1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

2. With respect to milk delivered by a producer to a handler's plant located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

3. With respect to milk delivered by a producer, whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

4. With respect to milk delivered by a producer, whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19.

SEC. 5. *Other Differentials.*—In making the payments to producers set forth in paragraphs 1 and 2 of section 1 of this article, handlers may make deductions as follows:

1. With respect to all milk delivered by producers to the plant of a handler which is located more than 40 miles from the State House in Boston and which is located more than 2 miles from a railroad shipping point, an amount not greater than 10 cents per hundredweight; provided, that such deduction has been approved and made public by the Market Administrator prior to the time of payment.

2. With respect to milk delivered by producers to a handler's plant which is located more than 14 miles, but not more than 40 miles from the State House in Boston, an amount equal to 10 cents per hundredweight of Class I milk actually sold or distributed in the Marketing Area from such plant, such total amount to be deducted pro rata on all milk delivered by such producers.

3. With respect to milk delivered by producers to any handler's plant from which the average daily shipment of Class I milk during any delivery period is less than 21,500 pounds, an aggregate amount, pro rated among producers delivering milk to such plant, equal to the difference between the freight to the marketing area at the carload rate and at the less than carload rate for the Class I milk shipped during such delivery period.

ARTICLE IX—MARKETING SERVICES

SECTION 1. *Deductions for Marketing Services.*—Except as set forth in section 2, each handler shall deduct an amount not exceeding 2 cents per hundredweight (the exact amount to be determined by the Market Administrator, subject to review by the Secretary) from the payments made direct to producers pursuant to article VIII with respect to all milk delivered to such handler during each delivery period by producers and shall pay such deductions to the Market Administrator on or before the twenty-fifth day after the end of

such delivery period. Such monies shall be expended by the Market Administrator for market information to, and for verification of weights, sampling, and testing of milk purchased from, said producers.

SEC. 2. *Producers' Cooperative Association.*—In the case of producers for whom a cooperative association, which the Secretary determines to be qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act", is actually performing, as determined by the Secretary, the services set forth in section 1 of this article, each handler shall make, in lieu of the deductions specified in section 1 of this article, such deductions from the payments to be made direct to such producers, pursuant to article VIII, as are authorized by such producers and, on or before the twenty-fifth day after the end of each delivery period, pay over such deductions to the association rendering such service.

ARTICLE X—EXPENSE OF ADMINISTRATION

SECTION 1. *Payments by Handlers.*—As his pro rata share of the expense of the administration hereof, each handler, except as set forth in section 1 of article VI, shall, on or before the twenty-fifth day after the end of each delivery period, pay to the Market Administrator a sum not exceeding 2 cents per hundredweight with respect to all milk actually delivered to him during such delivery period by producers or produced by him, the exact sum to be determined by the Market Administrator subject to review by the Secretary; provided, that each handler, which is a cooperative association of producers, shall pay such pro rata share of expense of administration only on that milk actually received from producers at a plant of such association.

SEC. 2. *Suits by Market Administrator.*—The Market Administrator may maintain a suit in his own name against any handler for the collection of such handler's pro rata share of expense set forth in this article.

ARTICLE XI—EFFECTIVE TIME, SUSPENSION, AND TERMINATION

SECTION 1. *Effective Time.*—The provisions hereof, or any amendment hereto, shall become effective at such time as the Secretary may declare and shall continue in force until suspended or terminated, pursuant to section 2 of this article.

SEC. 2. *Suspension and Termination.*—Any or all provisions hereof, or any amendment hereto, shall be suspended or terminated as to any or all handlers after such reasonable notice as the Secretary may give, and shall, in any event, terminate whenever the provisions of the act authorizing it cease to be in effect.

SEC. 3. *Effect.*—Unless otherwise provided by the Secretary in the notice of amendment, suspension, or termination of any or all provisions hereof, the amendment, suspension, or termination shall not (a) affect, waive, or terminate any right, duty, obligation, or liability which shall have arisen or may thereafter arise in connection with any provisions hereof; (b) release or waive any violation hereof occurring prior to the effective date of such amendment, suspension, or

termination; (c) affect or impair any rights or remedies of the Secretary, or of any other person, with respect to any such violation.

SEC. 4. *Continuing Power and Duty.*—If, upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handlers, by the Market Administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination; provided, that any such acts required to be performed by the Market Administrator shall, if the Secretary so directs, be performed by such other person, persons, or agency as the Secretary may designate.

The Market Administrator, or such other person as the Secretary may designate, (a) shall continue in such capacity until discharged by the Secretary, (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the Market Administrator, or such person, to such person as the Secretary shall direct, and (c) if so directed by the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the Market Administrator or such person pursuant hereto.

SEC. 5. *Liquidation After Suspension or Termination.*—Upon the suspension or termination of any or all provisions hereof the Market Administrator, or such person as the Secretary may designate, shall if so directed by the Secretary, liquidate the business of the Market Administrator's office, and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such suspension or termination. Any funds collected pursuant to the provisions hereof, over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the Market Administrator or such person in liquidating and distributing such funds, shall be distributed to the contributing handlers and producers in an equitable manner.

ARTICLE XII—LIABILITY

SECTION 1. *Handlers.*—The liability of the handlers hereunder is several and not joint and no handlers shall be liable for the default of any other handler.